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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Petitions of MCI Telecommunications and GTE Sprint Communications Corporation Regarding the Validity of Connecticut Statute and Decisions of the Connecticut Department of Public Utility Control Relating to Unauthorized Intrastate Traffic

MEMORANDUM OPINION AND ORDER

Adopted: October 16, 1986 **Released: October 27, 1986**

By the Commission:

I. INTRODUCTION

1. GTE Sprint Communications (GTE Sprint)[1] and MCI Telecommunications Corporation (MCI) have filed petitions asking us to issue a ruling declaring that certain portions of a Connecticut statute, as well as the implementing decisions and regulations of the Connecticut Department of Public Utility Control (CDPUC), are void and unenforceable because they conflict with our rules and policies and this Commission's exclusive jurisdiction over interstate communications. The challenged statutory and regulatory provisions implement a state prohibition on competition in intrastate services by requiring interexchange carriers (IXCs) providing interstate service in Connecticut to compensate local exchange carriers (LECs) in Connecticut for the unauthorized intrastate calls completed over the IXC networks. Petitioners also challenge certain advertising and notification requirements imposed as part of the Connecticut plan that obligate IXCs providing interstate services in Connecticut to inform their customers that they are not authorized to provide intrastate services. In this Order we find that there has been no violation of Commission rules or policies warranting federal preemption at this time and therefore deny the petitions. We also find, however, that certain decisions by the Southern New England Telephone Company (SNET) concerning the pace at which it is implementing equal access in Connecticut have substantially exacerbated the problems underlying this dispute and are not fully consistent with the equal access obligations we have established for independent telephone companies like SNET. Accordingly, in this Order we direct SNET to show cause why it should not be required to accelerate its equal access implementation schedule. Finally, we find that the plan's advertising requirements raise some serious concerns that, although not yet ripe for resolution, may require Commission action in the future.

II. BACKGROUND

2. In May 1985, the Connecticut legislature passed a law entitled "Preserving Universal Telephone Service in Connecticut" (Connecticut Act), establishing a moratorium on intrastate competition until at least January 1987.[2] The Connecticut Act directed the CDPUC to adopt a compensation and customer notification plan to ensure that the LECs in Connecticut[3] are reasonably compensated for lost revenues attributable to intrastate traffic improperly completed over IXC networks in violation of the ban.[4] In its implementing regulations of August 21, 1985, the CDPUC determined that each IXC intrastate access minute would be assessed a charge equal to the difference between the access charges already being collected for those minutes and the net revenues the LEC would have received if the call had been completed over telephone company facilities.[5] The CDPUC determined that the LECs were entitled to receive a total of 5.88 cents compensation at each end for each unauthorized intrastate minute.[6] In the case of SNET, for example, this formula resulted in a surcharge on each intrastate access minute of 2.6 cents: 5.88 cents/minute - 3.28 cents/minute (credit for revenues collected at SNET's current interstate access rates).

3. The Connecticut plan also provides that the intrastate access minutes are to be determined according to the Entry/Exit Surrogate (EES) method of jurisdictional determination, pursuant to which calls which enter an IXC network in the same state in which the called station is located are deemed to be intrastate, and calls which terminate in a different state than their IXC point of entry are considered interstate.[7] The CDPUC plan requires IXCs to track and report their intrastate toll calls to the LECs on a quarterly basis.[8] For each minute reported as intrastate pursuant to the EES, the LECs are directed to withhold from the National Exchange Carrier Association (NECA) pools, including the mandatory carrier common line (CCL) pool, the amounts already received from the IXC according to the applicable Feature Group interstate access charge and to treat such withheld revenues as current intrastate toll revenue. To further enforce the ban on intrastate competition, the Connecticut Act and CDPUC regulations also require IXCs providing interstate service in Connecticut to inform their customers of the ban by means of pre-approved semi-annual mailings to their customers, advertising campaigns, customer contacts and other similar methods which explicitly state that the IXC is authorized only to provide interstate services.[9]

4. GTE Sprint and MCI filed suit in the U.S. District Court for the District of Connecticut to enjoin the enforcement of the Act and the CDPUC decisions on the grounds that those state actions intrude into areas of interstate communications exclusively regulated by this Commission in violation of the Supremacy and Commerce Clauses of the U.S. Constitution. The court determined that the "essence of this controversy concerns the FCC's comprehensive regulatory responsibilities . . . and the resolution of the principal legal issue of preemption in this case requires extensive findings of complicated and controverted technical facts."[10] Recognizing the need for technical expertise as well as a resolution consistent with the FCC's regulatory responsibilities, the court invoked the doctrine of primary jurisdiction and stayed its resolution of the case pending consideration by this Commission. The court ordered plaintiffs to file petitions for declaratory ruling with this Commission by March 27, 1986, asking us to determine whether the Connecticut Act and CDPUC decisions regulate interstate communications within this Commission's jurisdiction under the 1934 Communications Act (Act) or pursuant to Commission rules or policies.[11] MCI and Sprint filed the petitions now before us on March 28, 1986, and we solicited comments on the issues raised in these petitions.[12]

III. THE PETITIONS

5. MCI and GTE Sprint[13] argue that the Connecticut statute and regulations directly and seriously impair the ability of the OCCs to provide interstate communications in Connecticut. Petitioners do not dispute that states have the authority to ban intrastate competition or that it is possible for OCC subscribers in Connecticut to complete calls to other locations within Connecticut using petitioners' networks;[14] but they claim their subscribers' ability to make intra-Connecticut calls over their networks is directly attributable to the fact that OCCs in that state receive inferior access arrangements that do not permit automatic diversion of unauthorized intrastate calls to the LEC networks. The access arrangements AT&T receives do permit it to divert unauthorized traffic. Petitioners reason that because these unauthorized intrastate calls are an unavoidable consequence of their lawful provision of federally tariffed interstate services, and without equal access they can cease carrying intrastate traffic only by ceasing to offer interstate services, federal authorities should have jurisdiction over all this traffic. They claim that the substantial costs of complying with the compensation plan or equipping their networks to permit blocking pose an unjustifiable burden on their interstate customers, especially in light of the fact that equal access will in large part eliminate this problem. They also contend that even if such blocking were performed it would result in blocking some authorized interstate traffic. Petitioners also assert that the advertising and customer notification requirements, besides discriminating in favor of AT&T, impermissibly burden interstate communications, both because of the costs of compliance and the frustration of OCC plans to promote their interstate services through a uniform national marketing approach.

6. More specifically, petitioners base their opposition to the Connecticut plan[15] on four related legal arguments:

A. *Connecticut is impermissibly attempting to regulate traffic that is either interstate or incidental to interstate communication and subject to this Commission's exclusive jurisdiction.* Petitioners generally state that under section 3(a) of the Communications Act, this Commission's jurisdiction over interstate communications extends to those intrastate messages or services which are "incidental" to the primary interstate operations or communications with which they are associated.[16]
They characterize the small amount of unauthorized intrastate OCC traffic as incidental to the OCC interstate traffic because it is both secondary to, and inextricably intertwined with, the interstate operations.[17]
Petitioners claim that due to the technical limitations of FGA and FGB,[18] they cannot offer interstate service in Connecticut without permitting some intrastate calls to be placed over their networks, and that federal authority must, therefore, extend to all aspects of the service.[19] They also contend that in the case of border-straddling metropolitan areas where subscribers in one state (for example, New York) may place a call to a party in a neighboring state (Connecticut) through a toll-free call to an OCC point of presence (POP) in that neighboring state (Connecticut), a blocking plan would necessarily interfere with the transmission of authorized interstate calls: these calls would be blocked because under the EES test they appear to be intrastate. Petitioners further state that they in no way hold themselves out to Connecticut customers as providers of anything other than interstate services and that all payments for these so-called intrastate calls are interstate in nature: the OCCs pay the LECs for all "intrastate" calls completed over OCC networks in accordance with SNET's interstate access tariffs, and the OCCs in turn bill their customers interstate rates for all calls that enter their networks in Connecticut.[20]

B. *The Connecticut compensation plan imposes a direct burden on interstate customers and operations.* Petitioners claim that under the Supremacy and Interstate Commerce Clauses of the Constititution, state actions regulating intrastate communications are unlawful if such actions substantially burden or conflict with valid policies or rules adopted by this Commission for the interstate jurisdiction. They claim that the substantial costs of the compensation requirements attributable to unauthorized intrastate operations will be borne by their interstate ratepayers since they cannot file intrastate tariffs in Connecticut and thus have no way to recover these costs from Connecticut intrastate ratepayers.[21] Petitioners characterize this plan as, in effect, a surcharge levied on OCC interstate communications to support Connecticut local exchange service. They also state that the expenses and burden imposed on interstate customers if they had to bear the cost of implementing blocking capability would have been greater still. Petitioners claim that these state-imposed burdens on interstate operations will substantially prejudice the ability of the OCCs to operate effectively as interstate carriers in Connecticut and elsewhere, and may make continuation of OCC interstate offerings in Connecticut economically infeasible. The advertising requirements are similarly said to infringe on interstate operations, both in terms of the economic costs and their interference with the OCCs' efforts to advertise and market their interstate services on an integrated, uniform basis in all states. Petitioners point to the likelihood that other states might impose their own, potentially conflicting, requirements on OCC advertising for interstate operations. They also challenge as impermissibly broad and burdensome the scope of the restrictions on "Connecticut advertisements" -- a term they claim the CDPUC has repeatedly declined to clarify -- which might be interpreted to extend to all of their print and broadcast advertising that could reach Connecticut.[22]

C. *The Connecticut plan conflicts with this Commission's access charge rules and our policies to promote equal access and interstate competition.* Petitioners claim that as result of the inseverable link between inferior access and the carriage of unauthorized traffic, the surcharge on this traffic effectively mandates a reduction in the 55% discount established by this Commission for non-premium access. This is said to undermine our transition plan that was designed to allow OCC's an opportunity to develop into effective competitors of AT&T. Petitioners also charge that the compensation plan violates this Commission's access charge rules for interstate cost recovery because it directs the local carriers to withhold revenues collected against interstate traffic from the NECA pools. They also contend that the Connecticut plan results in windfall revenues to the LECs that create disincentives for their rapid implementation of equal access; they assert that SNET receives more for the access it provides under the block-or-pay scheme than it would if equal access were fully implemented and these unauthorized calls were routed to SNET for completion.[23] The surcharge plan will, it is said, impede the ability and incentive of OCCs to continue to serve or to expand their customer base

nationwide, thereby undermining this Commission's policies to promote nationwide competition in interstate services.

D. *The Connecticut plan discriminates against OCCs.* Petitioners contend that the plan unfairly advantages AT&T in Connecticut since its superior FGC connections permit automatic diversion of intraLATA traffic to the LEC networks, while the OCCs are penalized for the technical limitation of their inferior access by having to bear the direct and indirect costs of either blocking such traffic or paying a surcharge on it. These costs include the diversion of substantial OCC resources that they say would otherwise be invested during this transition period in their efforts to become fully effective competitors to AT&T. They also challenge Connecticut's customer notification requirements on the grounds that they are discriminatory in their application and effect and will result in OCC customer confusion and marketing difficulties.[24] In addition to the significant cost and inconvenience of implementing state-specific advertising and notification procedures, petitioners believe that the required disclaimers will create the impression among customers during this critical presubscription period that the OCCs' interstate offering in Connecticut --and elsewhere -- are more limited than those of AT&T. As a result, fewer customers will subscribe to or use the services of the OCCs. GTE Sprint argues that even if AT&T were subject to similar restrictions, the negative impact of the disclaimer would fall much more heavily on the OCCs than a service provider as strongly entrenched as AT&T.

IV. SUMMARY OF PLEADINGS

A. Comments

1. IXCs

7. ALC, U.S. Telecom, and CommuniGroup (a holding company comprised of four interstate resellers) all support petitioners' preemption request. ALC states that the unauthorized intrastate calls are inseparable from interstate services as a result of inferior access, and that Connecticut has imposed an unfair and discriminatory penalty on the OCCs rather than requiring aggressive equal access implementation. ALC urges this Commission to provide guidance to other states regarding the propriety of this type of regulation in general. U.S. Telecom believes that OCC blocking of intrastate calls is unrealistic and that the underlying problem is not being adequately addressed because SNET is not converting its end offices as rapidly as it should. U.S. Telecom also suggests that failure to preempt would create confusion as it might lead other states to adopt their own compensation plans that are inconsistent with each other and with federal policy. CommuniGroup believes that the compensation plan and advertising requirements, which would apply to interstate resellers as well as facilities-based carriers, stand as direct obstacles to Commission policies encouraging the development of competition and resale services in the interstate market.

2. *LECs*

8. SNET, Woodbury Telephone Company, the commenting Bell Operating Companies (BellSouth, Bell Atlantic and Southwestern Bell) and other local exchange carrier interests (USTA, OPASTCO, and NTCA) for the most part argue that the Connecticut compensation plan is a legitimate assertion of the authority to regulate intrastate communications reserved to the states under §2(b) of the Communications Act, that state regulation of unauthorized intrastate traffic over IXC networks is separable from the federal regulation of those carriers' interstate operations, and that such state compensation schemes do not unreasonably infringe upon or burden interstate communications or federal rules or policies.[25]

9. These parties state generally that the right of states to decide whether or not to permit intrastate interLATA and/or intraLATA toll competition under the Act is undisputed, and further that the matter is of great importance to the states. They argue that the compensation plan represents neither a windfall to the LECs nor a penalty on the IXCs, but rather a reasonable method of enforcing a state decision to ban competition in furtherance of important state goals. They claim that if this Commission were to preempt in this case such preemption would amount to de facto federal authorization of intrastate toll competition in violation of § 2(b) of the Act. While they recognize that there may be some instances in which this Commission may override state regulatory authority over intrastate services or facilities, they say this is not such a case because this Commission is deprived of "regulatory power over local services, facilities and disputes that in their nature and effect are separable from and do not substantially affect the conduct or development of interstate communications."[26] These parties generally argue that this Commission's *EES Order* and the work of the FGA/FGB Joint Board clearly establish the separability of the state and federal aspects of the services here at issue. They claim that this Commission's decision not to preempt state regulation of the manner of calculating OCC intrastate switched access usage of FGA and FGB and our interim approval of the EES method of jurisdictional measurement proves that OCC interstate and intrastate traffic over these lines are severable and that the means and methods of compensation for the traffic carried by the OCCs determined to be intrastate according to the EES method can to be left to the states without infringing on federal prerogatives.[27] In response to petitioners' suggestion that the *EES Order* is inapposite in states which have not authorized intrastate competition or the filing of intrastate access tariffs, SNET, BellSouth, USTA, and NTCA suggest that this Commission and the FGA/FGB Joint Board have never stated or implied that the *EES Order* and the EES method of traffic separations there endorsed apply only if interstate carriers are certified to provide intrastate as well as interstate services.

10. The LECs also dispute petitioners' claims that OCCs are unable to prevent unauthorized intrastate traffic solely due to their inferior access. Some of the LECs charge the OCCs have actually encouraged customers to use their networks to complete their intrastate toll calls more cheaply than over LEC facilities.[28] Despite state and federal encouragement to do so, the OCCs have, it is claimed, declined over the past several years to make the decisions and network investments that might have reduced or eliminated today's problem of unauthorized intrastate traffic. Some of the LECs also challenge petitioners' claims that it is not possible to identify and block unauthorized intrastate traffic with anything less than FGD access. While recognizing that with FGD and ANI, the LEC is able automatically to identify and block customer attempts to place intrastate calls over an OCC network, SNET and SWB claim that FGB-tandem and FGB-direct access connections allow the OCC switch to identify the trunk group and thus the area from which an incoming call originated.[29] In contrast to GTE Sprint's "conclusory" statement that its switches are not now

equipped to route traffic based on its incoming trunk group, and that it would cost millions of dollars to do so, SNET estimates that the generic software package to permit such routing would cost between $50,000 and $100,000. The LECs generally argue that some extra OCC expense for purposes of blocking is justified by the fact that non-premium access costs the OCCs substantially less than the premium access services for which the LECs are able to provide automatic blocking. They also state that ANI is available with FGB-direct access, but that OCCs have in most instances preferred to subscribe to less costly FGA access. Some LECs argue that the states will have to continue to deal with the issue of unauthorized intrastate traffic even after equal access because some OCCs may choose to continue subscribing to FGA and FGB services. Furthermore, they assert that, to the extent the inadvertent blocking of valid interstate traffic is attributable to leakage into the local exchange through, for example, a PBX, the problem will persist even after equal access is available, as this Commission's *EES Order* recognizes.[30]

11. The LECs also assert that the Connecticut plan does not create any substantial conflicts with federal policies or burdens on interstate communications sufficient to justify federal preemption. They claim that a valid state regulation may not be preempted merely because it will result in some added cost for interstate operations,[31] and that in this case the costs of complying with the compensation and advertising plan, are not onerous or unreasonable in light of the magnitude of overall OCC operations and revenues. The LECs say that the compensation plan only recaptures revenues the OCCs are not entitled to receive in the first instance and that in any event, the petitioners make no claim or showing that they are suffering any real loss, or that after paying the surcharge they are not at least recovering the costs of transmission of the unauthorized calls. Petitioners' real complaint, say the LECs, is that they are not being permitted to enjoy the same profit margin on unauthorized intrastate calls in Connecticut as they earn on their interstate traffic – a right to which they have no claim.

12. The LECs state that the interstate ratepayers will not be unfairly burdened with the costs of the surcharge for intrastate calls due to the lack of OCC intrastate customers or tariffs in Connecticut;[32] these costs are said to be no different than other variable state costs of operation (such as gross receipts taxes and access costs), which OCCs commonly pass on to their customers in their nationwide averaged rates. Some also suggest that petitioners may avoid any burden on the interstate jurisdiction by equipping their Connecticut switches to block intrastate calls and passing those costs to all their interstate customers or by adding a special charge to the bills of their Connecticut subscribers – either all such subscribers or only those with intrastate calls on their bills.[33] The LECs also dismiss claims that the Connecticut plan violates this Commission's access charge rules or other general policies, arguing generally that Connecticut's compensation plan for unauthorized intrastate traffic is the equivalent of an intrastate access charge for intrastate services provided for intrastate calls rather than a surcharge on interstate access charges for interstate calls. Some of these parties state further that the minutes recorded as intrastate under the EES method are reported as such, and the LECs are not required, and are indeed not allowed, to include the intrastate revenues or costs associated with those intrastate minutes in their transactions with the NECA pool.[34] On the issue of equal access implementation, SNET asserts that it is moving ahead with its equal access plans as required, and that there has been no violation of Commission orders or requirements in this area.[35] SNET also points to the fact that the compensation plan only provides it with the revenues to which it was entitled in the first place, and that under equal access, any reduction in revenues received under the compensation plan would be offset by increased payments to SNET for premium access.

13. The LECs also generally defend Connecticut's advertising and notification requirements as a reasonable and valid exercise of state authority. They claim that petitioners' allegations that these requirements are financially burdensome or disruptive of their marketing efforts do not establish that there is any substantial impairment of their ability to provide competitive interstate services in Connecticut, as would be necessary for federal preemption. They also claim that the discrimination issue raised by the OCCs is a factual dispute not yet ripe for Commission resolution since the CDPUC advertising requirements apply by their terms to all IXCs in Connecticut whose networks are capable of completing intrastate calls. Although there is some dispute regarding certain AT&T services in Connecticut, SNET claims that there has been no ruling by the CDPUC specifically exempting AT&T from the advertising or notification requirements.

3. State Commissions

14. Comments were filed by the regulatory commissions of Connecticut, Florida, Michigan, Missouri, West Virginia, and Wyoming, as well as NARUC. These parties generally oppose the preemption request on the same grounds as the LECs. They emphasize the purely intrastate nature of the communications the Connecticut plan regulates, as well as its physical and regulatory separability from the OCC interstate operations with which it is associated. They also dispute claims that the plan conflicts in any fundamental way with explicitly granted federal powers or policies promulgated pursuant to those powers, or that it would be impossible to comply with regulations in both jurisdictions.

15. Michigan argues that the Act's general purposes clause on which petitioners' rely for their preemption claim – Section 1 – does not displace state regulation of intrastate communication under Section 2(b). Connecticut claims that its rulings apply to all IXCs – including AT&T – to the extent their networks are capable of completing unauthorized intrastate calls;[36] that equal access, which will moot the problem, is proceeding according to schedule in Connecticut so that two-thirds of SNET's conversion will be completed by December 1987; that the "incidental" interstate traffic argument can only apply if separation or severability of the traffic or facilities between the jurisdictions is not possible; that petitioners have not shown that their attempts to promote interstate service in Connecticut would be materially affected in any way; and that there is no violation of NECA pooling requirements since the NTS pool was not intended or designed to collect revenues from intrastate operations. While both Missouri and Wyoming oppose preemption in this case, they also attempt to distinguish the compensation plans that exist in their states for unauthorized intraLATA calling over OCC networks from those prevailing in Connecticut. They urge the Commission to limit its decision in this declaratory ruling to the Connecticut case.[37]

16. Missouri also alleges that the OCCs have not, as they might have, acted to reduce the amount of unauthorized intrastate traffic on their networks by, for example, obtaining FGB-direct access, which includes ANI, or using FGB-direct or FGB-tandem connections to sectionalize their calling areas and route their interstate and intrastate traffic on separate trunk groups. Wyoming also claims that, rather than disadvantaging the OCCs, the compensation scheme puts them on par with AT&T since AT&T is not able to generate the extra windfall revenues that the OCCs realize through the carriage of unauthorized intrastate traffic. They also argue that the unauthorized traffic here at issue is not in any sense "incidental" to interstate communications, but separate, discrete intrastate communications, which are subject to state regulatory authority, and that to take away this authority would nullify the states' ability to regulate entry into their own markets. West Virginia adds that any interstate traffic that, due to the imprecision of the EES measurement method, is erroneously made subject to intrastate compensation, will likely be offset by intrastate traffic similarly mischaracterized as interstate. Florida asserts that the notification requirements are necessary if OCC customers are to comply with the state restrictions. Florida does, however, state that all interstate carriers, not just those lacking blocking capability, should be required to comply with these advertising requirements.

17. NARUC suggests that in claiming the Connecticut plan will jeopardize their ability to operate as interstate carriers, petitioners have mischaracterized both the Connecticut plan and their own financial position. According to NARUC, although the OCCs may not be earning the same rate of return on their unauthorized intrastate traffic that they do on their authorized interstate traffic, there is no evidence that they cannot recover their costs of carriage of the intrastate traffic under the compensation plan. NARUC also claims that the fact the OCCs may provide their intrastate service as a by-product of interstate service does not determine whether the states may lawfully regulate that portion which is intrastate. NARUC suggests that the OCCs might avoid any unfair advantage accruing to AT&T as a result of the advertising requirements by including in their advertising a list of other interstate carriers subject to the same limitations.

B. Replies and Supplementary Comments

1. Petitioners

18. In their reply comments and supplementary comments,[38] both petitioners generally argue that Section 2(b) of the Act, which limits federal regulation of the intrastate services or activities "of any carrier," does not bar preemption in this case because since Connecticut prohibits intrastate competition, the OCCs cannot be said to be § 2(b) "carriers" in that state. MCI claims that because it is prohibited from offering intrastate common carriage in Connecticut, and does not hold itself out as a provider of such service, the section 2(b) bar to federal authority invoked to invalidate Commission actions in the *Louisiana Decision* [39] is inapplicable. MCI furthermore contends that the Supreme Court's ruling in the *Louisiana Decision* in no way forecloses preemption in this case, because the Court there was not asked to decide the scope of the specific grant of federal authority over services that are incidental to interstate communications under section 3 of the Act and the relationship of that grant of authority to Section 2(b). GTE Sprint claims that, notwithstanding the *Louisiana Decision*, this Commission retains its exclusive jurisdiction over all interstate traffic, including OCC intrastate traffic that is incidental to, and inseparable from, interstate traffic.

19. Petitioners contend that while their interstate and intrastate FGA and FGB traffic may, according to the *EES Order*, be separable for purposes of "estimating usage" after calls have been completed, this traffic is not physically separable for purposes of blocking at the time the calls are made. They also further dispute SNET's suggestion that it is technically and economically feasible in the absence of ANI for OCCs to block or prevent intrastate traffic in Connecticut short of ceasing their interstate operations. They state that SNET's estimates of the costs, time, and effort necessary for OCCs to implement blocking or to obtain ANI by migrating to FGB-direct access are incorrect. GTE Sprint estimates that producing the software to screen and block intrastate traffic would take 12 to 18 months at a cost of up to $1 million. Furthermore, SNET's proposed solutions to the problem that contemplate separate FGA or FGB trunk groups and local access numbers dedicated to the New York border communities are said to be ineffective and to necessitate duplicative facilities. GTE Sprint also states that FGB-direct with ANI is available in only 42 of SNET's 104 end offices, and FGB-tandem access remains unavailable in over 21 percent of SNET's end offices. MCI and GTE Sprint also reiterate their charges that SNET has intentionally delayed implementing equal access and that SNET could virtually eliminate the problem of incidental intrastate calling by accelerating its equal access timetable.

20. GTE Sprint also states that SNET appears to be reporting and assigning all of the access costs for OCC intra-Connecticut traffic to the interstate jurisdiction, while revenues for those same minutes are flowing intrastate pursuant to the state compensation scheme. The OCCs are thus, it is said, contributing to SNET's intrastate revenues, while SNET has assigned the costs of providing service to the OCCs to the interstate jurisdiction. According to GTE Sprint, this discrepancy between the jurisdictional allocation of costs and revenues violates this Commission's Part 69 rules on access charges and pooling, as well as the principle it sees as clearly articulated in the *Louisiana Decision* that jurisdiction over a service or facility for regulatory purposes follows from the assignment of the costs associated with that service or facility.

2. SNET and State Commissions

21. In its reply, SNET claims that no federal access charge or pooling rules are being violated[40] and that the OCCs have mischaracterized the credit mechanism used to collect the monies owed to the LECs for intrastate OCC traffic under the compensation plan as a "surcharge on interstate access." According to SNET, the amounts paid to the LEC for each intrastate toll call at interstate access rates are merely being credited against the total compensation owed to SNET (5.88 cents/minute at each end) for each such intrastate call.[41]

22. The SNET and CDPUC reply and supplementary comments stress that the separability of intrastate and interstate traffic pursuant to the EES method for *all* types of state economic regulation, as well as the right of the states to regulate or ban intrastate competition, is established, and should in no way be dependent upon the presence or absence of intrastate (single LATA or multiLATA) competition, intrastate access tariffs, or state cer-

tification. They argue that it is within a state's prerogative to adopt a block-or-pay plan rather than to certificate carriers to carry unauthorized intrastate traffic, and that it makes no sense to find it proper for states to charge compensation for authorized calls, but improper to charge for unauthorized ones. The NJBPU, on the other hand, stresses the difference between the block-or-pay plan for intraLATA traffic in New Jersey, a multiLATA state which permits interLATA competition and intrastate access tariffs, and the plan in Connecticut. The NJBPU urges us to limit our ruling in this case to the Connecticut situation. The supplementary comments of NARUC, along with those of the CDPUC and the Florida Commission, stress that the *Louisiana Decision* establishes that claims that state regulation of intrastate communications frustrate federal goals and policies -- claims which they say are at the heart of the OCC petitions --are an impermissible basis for federal preemption.

V. DISCUSSION

23. We conclude, based on the particular circumstances of this case, that those portions of the Connecticut Act, and the implementing decisions and regulations of the CDPUC, that impose a charge on unauthorized intrastate calls completed over IXC networks, while not fully hospitable to this Commission's efforts to promote competition in interstate services, do not conflict with our rules or our exclusive jurisdiction over interstate communications so as to necessitate federal preemption. We make a similar finding with respect to the requirements that obligate IXCs providing interstate services in Connecticut to include in their advertising statements that they are not authorized to provide intrastate services. However, we remain ready to reconsider issues related to the advertising regulations in the event this requirement is interpreted and applied in a manner that unduly burdens IXCs' ability to provide and market their interstate services. We do, however, find merit in petitioners' claims that the general lack of equal access connections has resulted in extra burdens on OCCs from the Connecticut plan. We believe that an expedited schedule for SNET's conversion to equal access is feasible and will address the problem at the heart of the dispute and best serve the public interest. Accordingly, as more fully discussed below, we direct SNET to show cause why it should not be required to complete its equal access conversion program within twelve months from the date of release of this Order in accordance with the schedule described herein.

A. The Connecticut Compensation Requirement

24. This Commission has long recognized that, under the Communications Act, the states have broad latitude in their regulation of intrastate common carrier services. Thus, we have in some instances declined to preempt or otherwise intrude on state decisions or policies affecting intrastate services even if those state policies have had significant effects on matters over which this Commission has plenary authority. This policy has been most apparent in the decisions concerning the introduction of competition in intrastate services. For example, in a series of decisions affirming the right of subscribers to interconnect privately-provided pay telephones to the national telephone network pursuant to Part 68 of our Rules,[42] and to use those devices to offer competitive interstate pay telephone services, this Commission expressly declined to preempt state restrictions on intrastate resale or competition.[43] As a result, in some states the use of these pay telephones has been limited to the provision of interstate services alone, impairing to some degree the economic value of the federally-granted right to interconnect this equipment.[44] More recently, the Common Carrier Bureau denied a request for a ruling declaring that federal policies preclude state resale restrictions contained in the state tariffs of the BOCs from being construed to prohibit hotel or motel operators from collecting surcharges from their patrons for intrastate long distance telephone calls.[45] The Bureau declined to preempt such state restrictions because it concluded that Commission policies authorizing the interconnection of customer-provided terminal equipment and the resale of interstate common carrier services were not directly contravened by state regulations prohibiting resale of intrastate services. The Bureau was also not persuaded that the effect of the state resale restrictions on the conduct or development of interstate communications "would be so substantial as to warrant preemption."[46]

25. This policy, reflected in these interconnection and resale cases, recognizes the importance to states of control over decisions affecting the degree and nature of intrastate competition within their borders. Consistent with this approach, we find no occasion in the particular circumstances presented here to challenge the jurisdictional validity of the decision by the state of Connecticut to prohibit intrastate competition in toll service until January 1987 and to implement that prohibition through the enforcement mechanisms of the Connecticut plan. While we recognize that the Connecticut plan may have some undesirable effects upon interstate carriers and communications, we do not find that the Connecticut plan, either in its overall design or particulars as revealed in the record, presents a violation of federal policies or rules warranting preemptive action.

26. Although we have decided that asserting preemptive authority would not be necessary or appropriate in this case, we will briefly respond to some of petitioners arguments urging such action.[47] First, we do not accept the claim that the traffic carried over an IXC network that originates and terminates within Connecticut necessarily loses its essentially intrastate nature because the carrier is not certified to provide intrastate service, or because the unauthorized intrastate calls occur because the carrier receives non-premium FGA and FGB access connections for its interstate services. The Connecticut Act and the implementing CDPUC decisions and regulations establishing the Connecticut plan constitute an assertion of regulatory jurisdiction over this traffic within the state of Connecticut in the same way as if they had authorized such calls or certificated the IXCs for purposes of this limited intrastate traffic. Connecticut has merely recognized that this Connecticut traffic, whether authorized or not, does exist, and has attempted to compensate the LECs, which are the only authorized carriers of such traffic, for the revenues lost as a result of IXCs providing intrastate service.[48]

27. In addition, despite the undeniable nexus between the interstate operations of the OCCs in Connecticut and the unauthorized intrastate traffic they carry there, it is, in this case, possible to separate the two, albeit through estimation -- not precise measurement -- techniques, and it is reasonable to permit Connecticut to apply its compensation scheme to the portion of OCC traffic identified as intrastate. The EES method of measuring jurisdictional usage of FGA and FGB services, which is used under the Connecticut plan to identify the intrastate calls that will be subject to the state charges, has, at least for certain purposes, been endorsed by this Commission on an in-

terim basis.[49] The EES approach appears to be widely regarded as the most reliable and accurate method of jurisdictional determination available at this time,[50] and the Joint Board in CC Docket No. 85-124 is now considering the EES method, among others, in its efforts to develop a permanent, comprehensive solution to the problems relating to the measurement and verification of interstate and intrastate usage of FGA and FGB access services for the application of interstate and intrastate access charges. While this Commission has yet to adopt the EES or any other method of jurisdictional determination for permanent use for billing, for the present we are satisfied that the Connecticut charge would be assessed against those minutes of use that can, with reasonable accuracy, be said to be intrastate.[51] Furthermore, because the Connecticut plan requires either compensation to the intrastate jurisdiction or blocking of the unauthorized intrastate minutes, rather than solely blocking of that traffic, it is possible to permit the Connecticut plan to take effect without affecting the transmission of interstate calls. In light of all the circumstances presented in this case, we cannot say that the intrastate traffic is incidental to, or inseparable from, the interstate traffic in the sense of any physical, logical, or practical inseparability that would require us to subject the intrastate portion to the federal regulatory regime along with the interstate portion.[52]

28. We also find claims that the Connecticut plan attempts to regulate interstate communications because it in fact imposes an interstate charge or surcharge on interstate access rates to be unfounded. Connecticut seeks, in effect, to impose intrastate charges on intrastate services provided by the IXCs. The mechanism it has chosen to accomplish this uses interstate access charges as a base on which a surcharge is added.[53] While this results, in the words of one commenter, in a "somewhat awkward situation,"[54] it does not change the character of the underlying calls to which the state surcharge is applied or the nature of the surcharge itself. According to SNET, the Connecticut compensation plan is intended to take only intrastate costs and revenue requirements into account, and is assessed only against calls deemed to be intrastate under the EES. Although, as a result of the credit mechanism, the Connecticut compensation scheme includes in the revenues flowing to the state jurisdiction, amounts assessed against intra-Connecticut calls at interstate access rates, it would be a mischaracterization of the state plan to conclude that it thereby constitutes a surcharge on interstate access in any meaningful sense.

29. In a second major area of challenge, petitioners and their supporters argue that the Connecticut plan imposes an impermissible burden on OCC interstate customers and operations. While we agree that the Connecticut plan does impose some burden and extra costs on the activities of the OCCs providing interstate services in Connecticut,[55] we do not find these substantial enough to warrant federal preemption. Despite petitioners' assertions, we are not convinced that imposition of the Connecticut charge seriously threatens the growth of interstate competition or impedes the expansion of IXC operations. The volume of this unauthorized traffic is small relative to overall OCC operations and will diminish in the near future as equal access is implemented.[56] Connecticut is also one of the relatively few states in which intrastate competition is prohibited altogether.[57] In most states OCCs could recover any assessment upon intrastate access through intrastate interexchange tariffs. While we recognize that this lack of intrastate tariffs makes the situation in Connecticut somewhat problematic for the OCCs, this circumstance does not prevent them from recovering their costs of intrastate access through means compatible with Commission policies and consistent with their status as "forborne" carriers under our *Competitive Carrier Rulemaking*.[58] Although the record is unclear on this point, it is possible that the revenues received by the OCCs for the unauthorized minutes will be adequate to cover the Connecticut charges. If not, however, the OCCs may, consistent with basic Title II obligations and the exercise of their own business judgment, recover these special costs associated with their interstate operations in Connecticut[59] by including them in their nationwide averaged interstate rates charged to their interstate customers, by directly passing on the surcharge amounts to the specific IC customers in Connecticut placing these unauthorized calls,[60] or by imposing a uniform surcharge to recover these special Connecticut costs on all their customers in Connecticut.[61]

30. The Connecticut plan also does not appear to violate this Commission's access charge rules as some parties have charged. The IXC payments which the Connecticut LECs are directed to withhold from the NECA interstate pool represent amounts collected from the OCCs for intrastate calls, which are reported as intrastate minutes pursuant to the Connecticut plan's collection mechanism,[62] rather than amounts actually owed to the NECA pool for interstate traffic.[63] Indeed, as of the date its access tariff implemented the EES method for measuring jurisdictional usage, SNET should not have reported to the NECA interstate pools those minutes that were identified as intrastate under the EES method.[64] Thus, we do not construe the Connecticut plan as requiring the LECs either to misreport interstate minutes to the NECA pool or to withhold interstate revenues from the NECA interstate pool.

31. The state plan does not provide any specific directions regarding the treatment, for jurisdictional separations purposes, of the LEC costs associated with the access minutes identified as intrastate, and some parties have raised serious concerns on this point. In particular, GTE Sprint has stated its belief that SNET, while directing the revenues collected from OCCs for intrastate access services to the intrastate jurisdiction, has been assigning *all* of the costs related to the access services it provides OCCs – including those associated with unauthorized intra-Connecticut traffic – to the interstate jurisdiction.[65] If this were indeed the case, we might well have before us a misalignment of costs and revenues inconsistent with our Part 67 and 69 rules and the cost-recovery principles underlying them.[66]

32. While the record is less than totally clear on this point, we are not persuaded that Commission action is warranted at this time. SNET acknowledges that its July 2, 1985, annual interstate access charge filing did not reflect the effects of the CDPUC order because that state action was not taken until August 1985. SNET states that its subsequent switched access filings of April 1, 1986, and May 1, 1986, did not recalculate its switched access costs[67] or rates to account for the Connecticut decision because it determined that the impact was too insignificant to be reflected in those figures.[68] Importantly, SNET has made clear that it agrees with the "principle that all interstate filings should remove both state costs and state demand using the FCC's entry/exit surrogate," and indicated that its next annual interstate access filing, due October 3,

1986, will "back out" all intrastate costs and demand.[69] SNET also states that the October 1986 filing will reflect its interstate costs, demands, and revenues for the period June 1985 through May 1986,[70] and that these figures will not include state costs, demands, and revenues for the period subsequent to issuance of the CDPUC decision implementing the Connecticut Act. Thus, SNET's statements regarding separations and access charge calculation practices that will be reflected in its future filings, appear to be consistent with our rules and policies.[71] If it is established, pursuant to complaint or otherwise, that SNET has in the past, or does in the future, act contrary to its representations in this proceeding, we will take necessary action.[72]

33. Neither do we find that the Connecticut block-or-pay plan imposes costs on carriers with FGA and FGB access connections that are inconsistent with the premium/non-premium access differential established in the Commission's access charge plan.[73] The access charge plan represented, among other things, "an effort to preserve an opportunity for fair competition during a transition period in which we and the industry work to eliminate existing inequalities in interconnection options offered interexchange carriers."[74] This was accomplished, in part, by establishing a transitional 55 percent differential between the per minute access charges assessed for premium and non-premium access to reflect the fact that, in end offices not converted to equal access, the FGC access available to AT&T is superior in quality to the FGA and FGB connections generally available to the OCCs. The differential was based upon the technical and competitive advantages that flow to AT&T as a result of this higher quality access, including a variety of technical features that distinguish AT&T's access from the non-premium forms and that have had a competitive effect on IXC service offerings.[75] The discount provided the OCCs was designed to offset the advantages AT&T receives as a result of these differences – advantages that "clearly aris[e] as much from the inconvenience and expenses AT&T can avoid as from the benefits it provides."[76] Thus, the access charge plan contemplates that in some situations the OCCs might incur extra expense by virtue of their inferior access connections; AT&T may have the advantage of receiving automatic LEC diversion of its customers' intraLATA calls in Connecticut, but it pays a substantially higher price for the access service that makes this possible. While we are mindful of our responsibility to ensure the OCCs have a fair opportunity to compete for customers during this transition period to full equal access, and recognize that in some cases the nature or magnitude of an expense that falls solely on non-premium access customers might constitute a penalty or unreasonable discrimination warranting our intervention, we do not find that the Connecticut plan presents such a case.

B. Equal Access Implementation

34. Although we have found that petitioners have not demonstrated that federal preemption of the Connecticut plan is appropriate under applicable legal and policy criteria, they have established that the Connecticut plan operates in a manner that does not promote the goals underlying our access charge plan and competitive policies. The Connecticut plan has the effect of treating IXCs offerings interstate services differently –if not unlawfully – depending upon the technical capabilities of the access services that are available to them. This underscores the fact that our goals of establishing a competitive environment in the interstate market cannot be realized without the implementation of equal access. Indeed, in this case the parties are in general agreement that once equal access is available in Connecticut the unauthorized intrastate traffic that is the subject of this controversy will largely disappear. While the state prohibition on intraLATA competition remains in effect, with equal access the intraLATA calls of subscribers attempting to use OCC networks would –like those of AT&T's customers – be automatically diverted at the local switch to the LEC network for completion.[77] Because we believe that the lack of equal access is at the heart of this problem, and that the availability of equal access would, without undue burden, fairly address the interests of all parties to this dispute consistent with our access charge policies and equal access orders, we are herein proposing to require SNET to accelerate its current equal access conversion schedule.

35. Pursuant to our *ITC Equal Access Order*,[78] all non-GTE independent telephone companies (ITCs),[79] are required to convert those end offices equipped with stored-program-controlled (SPC) switches to equal access within three years of a reasonable request for such access by an OCC.[80] The first such request to SNET was submitted by MCI in June 1985. Therefore, SNET's conversion of its end offices must be completed no later than the spring of 1988. SNET claims it is in full compliance with its equal access obligations under the *ITC Equal Access Order*, and has attached its equal access schedule, which, it asserts, provides for conversion within the three-year window.[81] Petitioners have, on the other hand, charged that SNET is not fulfilling its equal access obligations. They variously claim that: SNET's role as marketing agent for AT&T's interstate services in Connecticut,[82] as well as what they view as "windfall" payments collected under the Connecticut compensation plan, have created incentives for SNET to prolong the transition to equal access for as long a period as possible; the costs of converting would not be burdensome for SNET because most of its lines are served by switches capable of providing equal access with "off-the-shelf" software enhancements; SNET has moved more slowly to announce and implement equal access than other similarly situated independents such as Cincinnati Bell and Rochester Telephone; SNET has disabled the equal access software in some of its 5EES switches; SNET will not begin equal access conversion to any significant extent until mid-1987; SNET did not convert its first two end offices to equal access until May 1986, representing less than 4% of its access lines.[83] Petitioners also argue that SNET is not one of the small, rural LECs that this Commission had in mind in establishing the three-year conversion schedule for ITCs, and that, in any event, this dispute can best be resolved by accelerating equal access implementation in Connecticut.

36. SNET, in responding to these various charges, claims to be engaged in all planning and preparations necessary to introduce equal access capability on schedule, and vigorously denies disabling any equal access software. SNET also notes that, unlike the BOCs, it has to undertake the investments of equal access conversion without the financial guarantee from AT&T afforded the BOCs pursuant to the MFJ, and that it serves a much larger area than other ITCs to which its progress has been unfavorably compared. SNET claims that even in SPC offices, equal access conversion is a costly, time-consuming and elaborate process.[84]

37. While we agree with SNET that it has adopted an implementation schedule that satisfies the three-year requirement of the *ITC Equal Access Order*, we believe that SNET, by focusing solely on that requirement has read too narrowly its equal access conversion obligations. The three-year schedule set forth in that Order was established in view of the characteristics of the typical ITC. We recognized that this typical ITC is a relatively small company, serving a rather small market, often in a rural area.[85] Accordingly, we based our less stringent equal access requirements for this sector of the local exchange industry upon consideration of the four characteristics that we found distinguished these companies from GTE and the BOCs: 1) the variability in installed stored-program-controlled equipment types in end offices; 2) the predominance of electromechanical equipment; 3) the existence of more severe constraints on capital spending; and 4) the likelihood that demand for equal access by customers and OCCs alike will be less.[86] SNET cannot, for these purposes, be said to be a typical ITC; its size, financial resources, predominantly urban territory, and more sophisticated switching capability, as well as the OCCs' desire for equal access in SNET territory, clearly set it apart from the vast majority of ITCs.[87] While in the *ITC Equal Access Order* we declined to establish different specific timetables for different ITCs depending on their circumstances, we nevertheless recognized the variations existing in the ITC sector in this regard. Thus we explicitly found that "some of the larger non-GTE ITCs may have relatively sophisticated equipment that can be converted in less than three years," and that there may be "instances.where the three-year deadline is unnecessarily long."[88] We therefore directed that ITCs in such cases "endeavor to make the necessary conversions earlier than three years following reasonable request," and stated that the ITCs were, like the GTOC's pursuant to the *GTE Consent Decree*, here being "required to advance the implementation of equal access if the necessary software and hardware becomes available sooner than anticipated."[89]

38. On the basis of the record before us, we believe that pursuant to the standards and requirements set forth in the *ITC Equal Access Order*, SNET should complete its equal access conversion process in less than three-years following a reasonable request for conversion.[90] This determination, coupled with the fact that the unavailability of equal access in Connecticut has given rise to the controversy now before us, while its availability will largely resolve it, leads us to tentatively conclude that SNET should accelerate its current equal access conversion timetable for its equal access capable *i.e.*, SPC-equipped, offices.

39. Therefore, we direct SNET to show cause, within thirty days of the release of this Order, why we should not require it to complete its equal access conversion obligations as imposed by the *ITC Equal Access Order* within one year of the release date of this Order, converting at least one half of its remaining unconverted SPC offices (as reflected in its current schedule for conversion of its "equal access capable" offices contained in Exhibit 3 of its Comments in this proceeding) within the first six months of the year and the remainder by the close of the 12-month period.[91] In its filing, SNET should describe the equipment and switches in its end offices relevant to equal access conversion and discuss the financial, technical, and other resources necessary to implement equal access in those offices.[92] It may also offer any arguments on why, in light of the characteristics of the typical ITC enumerated in the *ITC Equal Access Order*, as well as the requirement that ITCs that are able to do so should convert more rapidly than in three years, it believes the schedule proposed herein would be unduly burdensome or otherwise inappropriate. SNET should include all other facts and arguments relevant to a final determination on this matter. We will also permit interested parties to file replies to SNET's response by establishing a brief pleading cycle for that purpose once we receive SNET's response.

C. Advertising Requirements

40. Finally, the Connecticut plan's advertising requirements raise special concerns regarding their potential scope and application. We discuss those concerns below, but do not take any preemptive action because we believe that the facts on this point are not sufficiently ripe to permit definitive resolution of the issues.

41. Our concerns with regard to these requirements deal primarily with their vague references to "advertising campaigns" and "Connecticut advertising" in requiring ICs to disseminate disclaimers that their services may only be used for interstate calling.[93] While this language has yet to be interpreted by the CDPUC,[94] we are concerned that, in its application, this requirement may constitute an attempt to regulate the conduct of carrier advertising practices and activities that are predominantly interstate in nature and directed solely to their interstate communications services. Such might be the case if, for example, the Connecticut advertising requirements were to extend to IXC advertisements for interstate services placed in regional or national magazines or newspapers, or over broadcast transmissions merely because they could reach Connecticut residents from other states. Such application of Connecticut's advertising requirements might intrude on the federal prerogative over practices related to interstate communications,[95] and so impair the ability of OCCs to market their interstate services that we would find a substantial enough burden on interstate competition to justify preemptive action on our part.

42. While carrier advertising/notification practices undertaken in connection with their interstate services may be subject to our regulatory authority, it is an area in which we have not adopted any comprehensive rules or policies, but generally left to the marketplace, the discretion of the carriers themselves, and the state and federal laws governing deceptive advertising or other unfair trade practices.[96] We have become involved only in those specific instances in which it has been necessary.[97] This does not mean, however, that in the absence of specific federal rules to the contrary, states have unfettered authority to impose restrictions or requirements on the advertising practices of carriers providing interstate services to customers in the state.[98] While we recognize that states have a legitimate interest in ensuring that their residents are aware of the rates, services, and practices of the carriers providing service in that state, and do not wish to interfere with reasonable state efforts to accomplish that goal (such as the enforcement of state unfair trade practices laws), this Commission's plenary authority over interstate communications places limits on the states' ability to direct the advertising/notification activities of the carriers providing interstate services.

43. Actions that Connecticut might take pursuant to the presently vague advertising regulations might also open up the possibility that a carrier's ability to conduct a national advertising campaign for its interstate services

might become seriously compromised under the weight of the individual and conflicting requirements of fifty different states. We are concerned about the serious impact such requirements could have on our competitive policies for interstate services and our various rules adopted to ensure all IXCs have an equal and full opportunity to compete.[99] In light of this potential conflict, we remain prepared to revisit these issues and assert our authority under the Communications Act[100] should it prove necessary.[101]

VI. ORDERING CLAUSES

44. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i), 4(j) and 208 of the Act, 47 U.S.C. §§151, 154(i), 154(j), and 208, and Section 1.2 of the Commission's rules, 47 C.F.R. §1.2, that the petitions for declaratory ruling filed by GTE Sprint and MCI are HEREBY DENIED.

45. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 403 of the Act, 47 U.S.C. §§154(i) and 403, and Sections 1.1 and 1.701 of our Rules, 47 C.F.R. §§1.1 and 1.701, that SNET SHALL FILE an answer to this order to show cause, as described above, within 30 days of the release of this Order.

46. IT IS FURTHER ORDERED, That the Secretary shall cause a summary of this Report and Order to be published in Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

APPENDIX

Parties Filing Pleadings

Comments

ALC Communications Corporation (ALC)
Bell Atlantic Telephone Companies (Bell Atlantic)
BellSouth Corporation (Bell South)
CommuniGroup, Inc. (CommuniGroup)
Department of Public Utility Control, State of Connecticut (CDPUC)
Florida Public Service Commission (Florida)
State of Michigan and Michigan Public Service Commission (Michigan)
Staff of the Missouri Public Service Commission (Missouri)
National Association of Regulatory Utility Commissioners (NARUC)
National Telephone Cooperative Association (NTCA)
Organization for the Protection and Advancement of Small Telephone Companies (OPASTCO)
Southern New England Telephone Company (SNET)
Southwestern Bell Telephone Company (Southwestern Bell)
Telephone Electronics Corporation (TEC)
United States Telephone Association (USTA)
US Telcom, Inc. (US Telecom)
Public Service Commission of West Virginia (West Virginia)
Woodbury Telephone Company (Woodbury)
Public Service Commission of Wyoming (Wyoming)

Reply Comments

ALC
CommuniGroup
CDPUC
GTE Sprint Communications Corporation (GTE Sprint)
MCI Telecommunications Corporation (MCI)
State of New Jersey Board of Public Utilities (NJBPU)
SNET
USTA

Supplementary Comments

NARUC
SNET

Supplementary Reply Comments

CDPUC
GTE Sprint
MCI
NARUC

FOOTNOTES

[1] Since the filing of this petition, GTE Sprint has merged with U.S. Telecom. The new company is named U.S. Sprint Communications Company.

[2] An exception to the ban, however, is that carriers wishing to provide certain specialized services, *i.e.*, radio paging, mobile radio services, etc., may be certified to do so upon application to the CDPUC. Connecticut Act, Sections 2 & (3)(a).

[3] These include SNET, which serves over 95 percent of the access lines within the state, New York Telephone Co. (NY Tel), and the Woodbury Telephone Co.

[4] In determining what constitutes "reasonable compensation" to the LECs for unauthorized intrastate traffic, the Connecticut Act directs the CDPUC to consider: "(1) Revenues received by such telephone companies for such calls as a result of federal switched access charges and (2) revenues which such telephone companies would have received if such calls had been placed over the telephone companies' facilities." Public Act No. 85-187, Section 3(c). IntraLATA toll rates in Connecticut have apparently traditionally been set above economic costs in order to subsidize Connecticut local exchange service. *See* Comments of CDPUC at 8 and 23-24.

[5] According to Sprint, access for incidental, intrastate IXC calls have been billed by SNET at interstate rates as if they were interstate calls; the Connecticut plan would thus require the IXCs to pay a state "surcharge" to the local carrier for each intrastate access minute in addition to the "interstate" access charge rates already being assessed against those minutes. *See infra* notes 20 and 53.

[6] According to the CDPUC, the 5.88 cents figure was computed by: (1) determining the gross revenue per minute for toll service normally earned by the LEC (17.1 cents); (2) converting gross revenue per minute to gross revenue per access minute by eliminating time associated with dialing, ringing, and making connections (15.78 cents); (3) subtracting costs the LEC would save for unauthorized intrastate traffic handled by the interstate carrier and including gross receipts taxes, yielding net revenues per access minute (11.77 cents); and (4) dividing access minutes by one-half to eliminate double counting caused by the fact that interstate carriers report both originating and terminating access minutes (5.88 cents). *See* Decision of Connecticut Department of Public Utility Control, Docket No. 85-05-23, "Investigation into Compensation to Telephone Companies by Interstate Common Carriers for Unauthorized Intrastate Calls," August 21, 1985 (*Decision*); Decision on Reopening, Docket

No. 85-05-23, December 23, 1985. (*Decision on Reopening*). The Connecticut surcharge will vary in accordance with changes in the interstate access rates as well as the other elements used in calculating the surcharge. *See Decision on Reopening* at 9.

[7] The EES is a method of measuring relative interstate and intrastate usage over Feature Group A (FGA) and Feature Group B (FGB) access lines (which carry FGA and FGB access traffic on a non-segregated basis), which this Commission has endorsed on an interim basis for purposes of access charge calculation in states in which there is concurrent federal and state tariffing of FGA and FGB access. *See* MCI Telecommunications Corporation, Determination of Interstate and Intrastate Usage of Feature Group A and Feature Group B Access Services, FCC 85-145 (released April 16, 1985) (*EES Order*), *recon. denied* Memorandum Opinion and Order, FCC 85-595 (released Nov. 13, 1985). *See also infra* notes 49 & 51. The FGA/FGB measurement problem arises because although the LECs need information as to the relative amounts of interstate and intrastate traffic carried over their FGA and FGB access lines for access charge billing purposes, the LECs generally lack the technical ability to identify the traffic on a jurisdictional basis and measure such usage themselves. We have convened a Federal-State Joint Board to recommend a permanent resolution of the FGA/FGB measurement problem. *See* In the Matter of Determination of Interstate and Intrastate Usage of Feature Group A and Feature Group B Access Service, CC Docket No. 85-124, Notice of Proposed Rulemaking and Order Establishing a Joint Board, FCC 85-196 (released April 25, 1985), 50 Fed. Reg. 18537 (1985). This Commission has also recently asked this "FGA/FGB Joint Board" to consider the separations implications of the jurisdictional measurement of FGA and FGB access traffic. Supplemental Notice of Proposed Rulemaking, CC Docket No. 85-124, FCC 86-460 (adopted Oct. 21, 1986).

[8] By its terms the Connecticut compensation requirements apply to all providers of interstate common carrier telecommunications services in Connecticut, although American Telephone and Telegraph Company (AT&T), would generally not incur liabilities under the plan as a result of its Feature Group C connections, which enable the LEC automatically to divert intrastate calls. AT&T is, however, required to report minutes of intrastate use under the EES, even if those are zero. *See Decision on Reopening*. As discussed below, however, the non-AT&T IXCs, commonly referred to as other common carriers (OCCs), claim the compensation plan in fact discriminates against them.

[9] The CDPUC's original decision subjected all interstate carrier's to these notification and advertising requirements, but pursuant to AT&T's request for reconsideration, the CDPUC clarified that the notification/advertisement requirements apply only to those interstate common carriers "with the technical capability of completing unauthorized intrastate calls." *Decision on Reopening* at 6. In its original *Decision*, however, the CDPUC made a finding that AT&T "has the capability and may be completing jurisdictionally intrastate calls through a number of services it provides." *Id.* at p. 653.

[10] Civil No. H-85-974 (AHN) at p.4, entered February 24, 1986.

[11] The parties entered into a stipulation essentially agreeing to maintain the status quo, *i.e.*, not to implement the challenged plan, until the court enters its final judgment. In the interim, the OCCs agreed to track and record their unauthorized intrastate traffic and the CDPUC and Connecticut Attorney General agreed not to enforce the Act or implementing regulations.

[12] Public Notice, Petitions for Declaratory Ruling Regarding Connecticut Statute and State Administrative Action Filed, released April 7, 1986. The parties filing comments and reply comments are listed in Appendix A. After close of the regular comment cycle, SNET requested that interested parties be allowed an opportunity to file additional comments to discuss the impact of the Supreme Court decision in *Louisiana Public Service Commission v. Federal Communications Commission*, et. al. (*Louisiana Decision*), 106 S. Ct. 1890 (1986), on the issues presented by the Connecticut compensation plan. The *Louisiana Decision*, which dealt with the scope of this Commission's preemptive authority over state regulation of the depreciation of dual jurisdiction property for intrastate ratemaking purposes, was issued one day before the close of the comment cycle in this case. SNET's request was not opposed and our Common Carrier Bureau allowed a brief opportunity to comment for the limited purposes requested. *See* Order, Mimeo No. 5102, released June 10, 1986. The parties filing Supplementary Comments and Reply Comments are also listed in Appendix A.

[13] Each of these parties filed a separate petition for declaratory ruling. Although the substance of these two petitions differ in some respects, their arguments for the most part overlap, and we here summarize them together for purposes of convenience.

[14] GTE Sprint indicates that in 1985 approximately 12% of its billed conversation minutes were for service originating and terminating in Connecticut. GTE Sprint Petition at 14. MCI estimates that 5% of its traffic in Connecticut is intrastate as measured by the EES technique. MCI Petition at 19.

[15] While petitioners confine their petitions to the Connecticut facts, they note that many of the arguments presented apply equally to similar "block-or-pay" plans in other states. Approximately a dozen states have adopted such plans, which require interstate carriers either to block unauthorized intrastate toll calls or to compensate the exchange carriers when such calls are completed. Since most of these states have authorized inter-LATA competition, the block-or-pay schemes typically apply only to intraLATA calls and are imposed on IXCs certificated to provide intrastate interLATA service.

[16] That section defines "wire communication" to be the "transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, *including all instrumentalities, facilities, apparatus and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.*" 47 U.S.C. §153(a) (emphasis added)

[17] They claim that the Commission's endorsement of the EES method of jurisdictional determination in its *EES Order* does not alter this conclusion, because that decision was directed to separating traffic in situations -- unlike the one presented here -- in which there was dual state and federal tariffing of access services. GTE Sprint Petition at 17; MCI Petition at 24-25.

[18] These technical limitations are said to be due to the fact that neither FGA nor FGB-tandem access connections provide automatic number identification (ANI). An OCC cannot identify the calling number or the jurisdictional nature of the call without ANI. MCI suggests it would cost millions of dollars to equip OCC networks and switches to make routing decisions based on the incoming trunk group of the call.

[19] They cite as precedent the customer premises equipment (CPE) interconnection decisions, *see infra* note 26, in which, due to the indivisibility of the network, the courts upheld this Commission's assertion of primary regulatory authority over CPE used to provide both interstate and intrastate services. Petitioners claim that the federal authorization of the interstate

service preempts state power to regulate intrastate traffic that is incidental to, and inseparable from, the provision of that federally authorized service. *See also infra* note 52.

[20] While petitioners object to the "surcharge," they apparently agree that the LECs are entitled to some amount of compensation for the access services they provide in connection with IXC unauthorized, incidental, intrastate traffic. In this regard, petitioners seem to have adopted the practice of paying LECs for such access services at the rates set in the LECs' federal access tariffs. *See* GTE Sprint Petition at 2, n.1.

[21] MCI estimates that the cost to its company of the notification and compensation plan will be $1 million/per year. According to MCI, under the Connecticut compensation plan it would be required to pay SNET almost 30 cents in intrastate "access charges" for a 5 minute intrastate toll call in addition to the 35 cents paid to the LECs under federal interstate access tariffs on that call. MCI Petition at 10-11, 25. GTE estimates that had the plan been in effect since January 1, 1985, its total access payments to SNET would have increased by approximately 15-20% over the amount paid in accordance with federal access tariffs, and that it would cost approximately $1 million to implement the advertisement and notification requirements. GTE Sprint Petition at 15.

[22] For the precise language of these advertising requirements, *see infra* note 94.

[23] MCI further asserts that SNET has gone so far as to bypass or disable the equal access software that comes with its 5ESS switches. For a discussion of SNET's equal access obligations, *see infra* at paras. 34-39.

[24] Petitioners generally assert that AT&T has been unfairly exempted from these notification and advertising requirements, but that, in any event, under the CDPUC's own standard, *supra* note 9, AT&T should be subject to those requirements because customers of AT&T's Alliance and Software Defined Network (SDN) services are able to complete intrastate calls over AT&T's network. *But see infra* note 36.

[25] BellSouth and Bell Atlantic, which oppose preemption here, urge that in any event this Commission limit our decision in this case to the Connecticut compensation plan because compensation plans adopted or being considered in other states differ in important respects from the Connecticut plan. OPASTCO does not take a definitive position on the merits, but urges us to balance carefully the important state and federal interests at stake, and to tailor narrowly any exercise of our preemptive authority. On the other hand, TEC, a holding company of six small independent telephone companies, urges us to preempt the Connecticut plan because it would burden OCC marketplace entry and operations and thereby stifle competition throughout the industry.

[26] North Carolina Utilities Commission v. FCC, 537 F.2d 787, 793 (4th Cir. 1976) (*NCUC I*), *aff'd* Telerent Leasing Corp. et. al. 45 FCC 2d 204 (1974) (*Telerent*), *cert. denied* 429 U.S. 1027 (1976). *See, e.g.*, Bell Atlantic Comments at 2-3; SNET Comments at 13.

[27] The LECs also dispute petitioners' claim that the traffic in question is incidental to interstate traffic, arguing that the unauthorized intrastate traffic involved here is not physically inseparable from the interstate in a way that requires they be treated together by a single jurisdiction; that the amount of unauthorized traffic is not *de minimis*; that under the Act the jurisdictional nature of traffic is, in any event, determined by definitions and considerations other than its volume or "incidentality"; and that incidentality in no way defeats the Act's otherwise applicable jurisdictional principles.

[28] *See, e.g.*, Southwestern Bell Comments at 11.

[29] SNET and SWB in particular suggest that the OCCs could at reasonable cost minimize the potential that blocking of unauthorized intrastate calls would result in the blocking of valid interstate calls in border-straddling metropolitan areas by sectorizing their FGB direct or tandem access trunk groups by state; by using separate FGA access groups and numbers for customers in different states; or by keying the customer "pin" numbers according to their state of residence.

[30] *See, e.g.*, Southwestern Bell Comments at 14-15; SNET Comments at 30; and *EES Order* at para. 20, n.17.

[31] Indeed, SNET claims that there is precedent establishing that states "retain jurisdiction over purely intrastate calls notwithstanding the economic effect such state jurisdiction might have on the interstate market." SNET Comments at 16 (citing NARUC v. FCC, 746 F.2d 1492 (D.C. Cir. 1984), *aff'd* In the Matter of Restrictions on the Resale and Sharing of Switched Services Used for Completion of Interstate Communications, 94 FCC 2d 1110 (1983).

[32] Bell South and Bell Atlantic note that this particular problem does not arise in their operating territories because those involve multi-LATA states that permit interLATA, if not intraLATA, competition. As a result, certificated IXCs are thus able to recover the costs of the state compensation scheme from intrastate customers pursuant to intrastate tariffs. Other LECs, however, argue that the validity of compensation schemes designed to serve legitimate state interests, such as Connecticut's, should not depend upon whether or not the state has authorized competition.

[33] SNET claims that this approach is no less fair than loading the costs associated with OCC unauthorized intraLATA traffic into the rates of all intrastate customers in states that permit intrastate interLATA competition, but prohibit intraLATA competition. SNET Comments at 39-40. *See also* Bell South Comments at 6.

[34] *See* NTCA Comments at 8-9 and SNET Comments at 41-42. SNET comments also emphasizes that, in any event, the amount of its withdrawal from the NECA carrier common line (CCL) pool is fixed due to the fact that non-traffic-sensitive local exchange plant costs are currently allocated between the jurisdictions according to a fixed percentage that does not vary with usage, and that it would be inappropriate to contribute revenues to the CCL pool associated with both intrastate and interstate use while withdrawing only interstate costs.

[35] SNET states that it has scheduled nearly 80 percent of its customer access lines for conversion by the fall of 1988, which will require modification of nearly 80 SNET switches. SNET asserts that this will entail considerable planning, investment, equipment modifications, and expenditure of other resources, even in the case of end offices with stored-program-controlled switches. SNET Comments at 45, Exhibit 2. p.15. For a full discussion of SNET's equal access obligations, see *infra* paras. 34-39.

[36] The CDPUC notes that although the dispute concerning the status of AT&T's Alliance and SDN services *supra* note 24, is not here before us, it believes these services would, unless otherwise classified as an authorized specialized service, *supra* note 2, be fully subject to the Connecticut plan. CDPUC Comments at 25-27.

[37] Missouri, a multi-LATA state, states that it has authorized interLATA competition and required OCCs to remit their intraLATA toll revenues to the LECs for every intraLATA call completed. Wyoming, essentially a single LATA state, claims that it has no prohibition against intrastate intraLATA competition (although neither MCI nor Sprint have applied for certification), and that OCCs may file state tariffs there. Wyoming nevertheless argues that the ability of states to determine

the jurisdiction and rate treatment of intrastate calls should be the same in all states regardless of whether or not competition is permitted.

[38] As mentioned previously, we allowed a supplemental pleading cycle to permit all parties to address the ramifications of the Supreme Court's recent *Louisiana Decision* on the issues before us. *See supra* note 12.

[39] *See supra* note 12.

[40] In an August 8, 1986, letter filed pursuant to Section 1.1231(b)(2) of this Commission's rules and made part of this record, 47 C.F.R. §1.1231(b)(2), SNET denies the allegations that it has been improperly assigning its costs, stating that, "SNET's interstate access charge costs are based on only jurisdictional interstate calls and that the intrastate calls covered by the Connecticut compensation plan as estimated by the carriers are not among these calls." SNET made an additional filing on August 22, 1986, also made part of this record, which more fully explains the processes used in its recent tariff filings (*i.e.*, July 2, 1985, April 1, 1986 and May 1, 1986) to calculate its interstate access charges. This August 22 filing describes the manner and extent to which these tariff filings reflect the effect of the Connecticut plan. *See infra* para. 32. On September 5, 1986, GTE Sprint filed a letter with the Commission commenting upon these additional SNET filings.

[41] SNET responds to claims that Connecticut's advertising and notification requirements are burdensome and discriminatory by observing that MCI and GTE Sprint have acceded to very similar rules adopted in Missouri. Missouri apparently requires that all media advertising published or broadcast primarily for Missouri distribution carry the message that intraLATA services are not offered or authorized. *See* SNET Reply Comments at 13. SNET also asserts, along with the CDPUC, that AT&T has in fact *not* been exempted from these requirements. SNET also contends that a challenge to these requirements on the grounds they are vague or overbroad is not yet ripe for Commission decision. *Id.* at 14.

[42] Part 68 of this Commission's Rules, 47 C.F.R. §§68.1-68.506 (1983), provides the procedural and technical requirements governing the interconnection of customer-provided terminal equipment to the telephone network. The Part 68 standards are designed to protect the network from harm.

[43] Registration of Coin Operated Telephones Under Part 68 of the Commission's Rules and Regulations, Memorandum Opinion and Order, FCC 84-270 (released June 25, 1984), 49 Fed. Reg. 27763 (1984); Universal Payphone Corporation Petition for Declaratory Ruling, Memorandum Opinion and Order, FCC 85-222 (released May 6, 1985); In the Matter of PAYTEL SYSTEMS Inc., Memorandum Opinion and Order, Mimeo No. 2583 (released Feb. 14, 1986) (*PAYTEL*). *See also* In the Matter of International Business Machines Corp. Request for Declaratory Ruling Re State Regulation of Shared Telecommunications Services System, File No. ENF. 85-45, Memorandum Opinion and Order (adopted Jan. 14, 1986), denied a request for a ruling that state restrictions on local resale that preclude or limit the competitive provision of shared tenant services are inconsistent with federal policies and have been effectively preempted by prior Commission interconnection decisions. In a Notice of Inquiry adopted the same day, we initiated further inquiry into the policy issues raised by the IBM petition, including those related to the resale of local service by an STS system. *See* In the Matter of Policies Governing the Provision of Shared Telecommunications Services, CC Docket No. 86-9, FCC 86-26 (released Jan. 27, 1986). That proceeding is pending.

[44] *See, e.g., PAYTEL* at para. 9.

[45] Intrastate Telephone Surcharges by the Lodging Industry, Memorandum Opinion and Order, Mimeo No. 5077 (released June 12, 1985).

[46] *Id.* at paras. 10-11. *See also Jordaphone Corporation of America v. AT&T*, 18 FCC 644 (1954), concerning a complaint relating to the regulation of customer-owned automatic answering devices in which we said, "[w]hile we do not doubt the jurisdiction of this Commission to regulate the use of these devices in interstate communications in any case in which the record shows a need for such regulation, we hesitate to exercise our jurisdiction in a manner which might in effect preclude the independent exercise of jurisdiction by local regulatory agencies . . . unless the record reveals a very clear need for such action so far as interstate telephone service is concerned." *Id.* at 670.

[47] We recognize that if we were convinced that preemption was warranted for policy reasons, it would be necessary to consider the reach and effect of the recent *Louisiana Decision* on the case before us. In light, however, of our determination here that preemption is neither necessary nor appropriate as a matter of federal policy, we need not address such issues.

[48] While the record evidences some dispute regarding the methodology and assumptions used by the CDPUC to compute the amount of compensation, *see* MCI Reply Comments at 36, most of the parties do not challenge the surcharge amount. The petitioners dispute the right of the state to direct that such a charge be levied in the first instance.

[49] *See supra* note 7. In the *EES Order*, we held that we had not preempted state regulation of the manner of determining intrastate switched access usage of FGA and FGB access lines for purposes of intrastate access charge billing. We did not find it necessary to preempt the states, concluding not only that the EES approach being used by many states to measure intrastate FGA/FGB usage did not appear to be unreasonable, but that, at least on an interim basis, interstate usage for access charge billing purposes should be determined in accordance with the EES method as well. The Joint Board in CC Docket No. 85-124 was convened to develop a permanent, comprehensive solution to this jurisdictional measurement problem.

[50] *See* comments filed in CC Docket No. 85-124, *supra* note 7, in response to Order Inviting Comments, FCC 85-570 (released Oct. 28, 1985).

[51] Petitioners and some of the commenters are correct in noting that in our *EES Order* we endorsed the EES method specifically for purposes of access charge calculations in states that certify OCCs to carry intrastate traffic and in which there is concurrent federal and state tariffing of FGA and FGB access. We do not, however, agree with their conclusion that it therefore follows that the EES method has no relevance to a state without authorized intrastate competition, such as Connecticut. In both instances the EES method is being used to arrive at a reasonable approximation of the amounts of interstate and intrastate traffic being carried over OCC networks in circumstances in which all parties agree exact measurements of such traffic are not feasible. We also note that we in no way intend to prejudge the outcome of the ongoing Joint Board deliberations in CC Docket 85-124. If that Joint Board should recommend, and this Commission adopt, a permanent access charge measurement approach that is different from the EES, Connecticut presumably would revise its plan. *See also infra* note 68 (regarding jurisdictional measurement methods and separations).

[52] By contrast, the indivisibility of telephone equipment used to provide interstate and intrastate services and the impracticability of requiring separate equipment for such services led the Commission in the *Telerent* case, *supra* note 26, to preempt state regulations that would have prohibited the interconnection of customer-provided equipment used in intrastate communications.

[53] The collection of interstate access charges for the unauthorized IXC interstate traffic -- which amount is credited against the total amount owed the LEC for this traffic under the state compensation plan -- is apparently merely a convenient mechanism for implementation of the state compensation scheme. Presumably, Connecticut might instead have chosen to combine existing charges and the surcharge and assess a single charge of 5.88 cents per minute. The essential operation and effect of the Connecticut plan would be the same in both cases.

[54] *See* USTA Comments at 8.

[55] There is no indication in the record that the IXCs would adopt the option of blocking traffic. Thus, it appears that the direct costs include the surcharge payments on intrastate calls and expense of modifying their advertising and marketing plans to incorporate the Connecticut disclaimer. The OCCs allege other types of costs associated with the advertising restrictions, such as competitive disadvantage and negative customer perception. We address those concerns *infra* paras. 40-43. To the extent that IXCs may, in response to the Connecticut plan, attempt to reconfigure their networks to utilize certain advantages of FGB, this may also impose costs.

[56] To ensure that this problem does diminish rapidly, we are proposing herein to require SNET, which serves over 95% of the access lines within Connecticut, to implement equal access in its operating areas according to an expedited schedule that more closely comports with its obligations under our previous orders than the extended schedule SNET has adopted. *See infra* paras. 34-39.

[57] While most multi-LATA states have authorized intrastate, interLATA competition in long distance services, intraLATA competition is not as widespread.

[58] Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorization Therefor, CC Docket No. 79-252; First Report and Order, 85 FCC 2d 1 (1980), Second Report and Order, 91 FCC 2d 59 (1982), *recon . denied*, 93 FCC 2d 54 (1983), Fourth Report and Order, 95 FCC 2d 554 (1983), Fifth Report and Order, 98 FCC 2d 1191 (1984), Sixth Report and Order, 57 Rad. Reg. 2d (P&F) 1391 (1985), *vacated*, MCI Telecommunications Corp. v. FCC, No. 85-1030 (D.C. Cir. July 9, 1985) (addressing only the issue of whether this Commission has authority under Title II to require carriers to cancel tariffs).

[59] We do not preclude the possibility that the "special costs" imposed on an interstate carrier doing business in a particular state might, under certain circumstances, constitute an impermissible burden or penalty on interstate communications.

[60] The record suggests that OCCs generally could identify and bill these customers.

[61] The Common Carrier Bureau recently denied petitions to investigate an AT&T tariff that flows through the gross receipts taxes imposed on its interstate gross receipts in several states. Memorandum Opinion and Order, CC Docket No. 86-81, Transmittal Nos. 604 and 628 (released May 30, 1986) *motions for stay denied*, FCC 86-413 (released Oct. 6, 1986). The AT&T flow-through mechanism imposes a separate charge applicable only to customers in those jurisdictions that impose a gross receipts tax, and is designed to recover AT&T's state-specific gross receipts tax liability on a state-specific basis.

[62] As discussed earlier, for each minute identified as intrastate under the EES method, the LEC credits the IXC for amounts already received at the current interstate access charge rate and assesses a surcharge amount necessary to bring their total compensation to 5.88 cents for each access minute. *See supra* notes 6 & 20.

[63] The CDPUC has directed that, "each [interstate common carrier] shall report to the appropriate LECs . . . the number of intrastate access minutes per end it carries based on an entry/exit surrogate," and that "each LEC shall . . . report the intrastate minutes of use to and withhold access charge revenues from the appropriate interstate pools at a rate [based on the applicable federal access charge rates in effect] per intrastate access minute reported by the ICs and treat them as current intrastate toll revenues." *Decision on Reopening* at 8.

[64] In its August 22, 1986 filing, *supra* note 40, SNET indicates that it "has been withholding these state revenues [received from billing of state minutes using the EES] from the NECA settlement since August 21, 1985," the date on which the CDPUC implementing regulations were issued.

[65] *See* GTE Sprint Reply Comments at 12-14 and Supplementary Comments at 5-9. In particular, GTE Sprint points to SNET's July 2, 1985, interstate annual access tariff filing, which makes no mention of segregating intrastate minutes or OCC intrastate usage of its FGA or FGB access services.

[66] *See Supplemental Notice*, *supra* note 7, at para. 8. Only if these principles are observed, can we ensure that the charges for interstate access services are generally set at levels that properly recover the costs associated with provision of such services.

[67] SNET notes that, by virtue of the fact that the interstate allocator for NTS and line termination access costs is not dependent upon current usage levels, the removal from the NECA pool of the minutes now identified as intrastate pursuant to the state plan does not have an impact on the interstate allocation of their CCL and line termination costs associated with the provision of FGA/FGB services. SNET does acknowledge, however, that the Connecticut plan has, at least theoretically, a separations impact for access costs -- such as local switching and local transport -- that are separated on the basis of relative usage.

[68] For those access cost elements separated on the basis of relative usage, SNET asserts that intrastate costs and intrastate minutes are removed from the interstate cost and demand figures in roughly the same proportions, leaving the interstate rate virtually unchanged. Indeed, SNET states that the changes that do result from these small jurisdictional shifts in cost and demand are lost in rounding. For access costs separated pursuant to a fixed allocator, SNET claims that the result of removing intrastate minutes, while again too small to be recognized in the interstate rates, would actually be to slightly increase the interstate rate for these access elements.

[69] *See* August 22, 1986 filing, *supra* note 40. It does appear that SNET has improperly used unadjusted cost and demand figures in its April and May 1986 tariff filings. The fact that jurisdictional shifts in cost and demand for a particular service may be offsetting or so small as to leave the effective rate for that service unchanged after those shifts are taken into account does not eliminate a carrier's obligation to, as a general matter, assign costs and demand to the jurisdiction to which they belong in the first instance pursuant to Part 67 and Part 69 of the Commission's Rules. In this instance, however, in light of the apparent *de minimis* impact of these jurisdictional shifts on SNET's access rates originally filed July 2, 1985, we do not believe that there has been any past harm to access customers requiring remedial action at this time. We also recognize the earnings of the NECA CCL pool may have been slightly reduced by SNET's prior practices. If SNET included in its forecast of interstate access minutes on which NECA calculated the CCL rate those OCC intrastate FGA/FGB minutes, but withheld its revenues collected for such intrastate access services from the NECA settlement there may have been a very slight revenue shortfall in the CCL pool. However, we are not persuaded on the basis of what is before us in this proceeding that any Commission action is warranted. Neither NECA nor any other pool members have complained of any harm in this

regard. Furthermore, NECA pooling procedures allow for retroactive adjustments to monthly reported data for a period of up to 24 months, and we expect NECA will make any necessary adjustments within that period.

[70] This period represents the past year cost of service study period on which the rates for the access year covered by the October 3, 1986, tariff filings are in part based. *See* 47 C.F.R. § 61.38(b); Order, In the Matter of Commission Requirements for Cost Support Material to Be Filed with Access Tariffs on October 3, 1986, Mimeo No. 6356 (released Aug. 15, 1986).

[71] In particular, we note that we expect SNET will properly allocate its investment and expenses associated with those minutes identified and reported as intrastate under the EES to the intrastate jurisdiction as of the date the state of Connecticut effectively asserted its jurisdiction over the unauthorized intrastate traffic (*i.e.*, presumably the date on which the CDPUC *Decision* took effect), and IXC liability for these intrastate charges under the compensation scheme begins to accrue. Furthermore, as discussed earlier, the Joint Board in CC Docket 85-124 is now considering the separations implications of the measurement of intrastate and interstate FGA/FGB usage for access charge billing purposes. We expect that SNET will ensure that its measurement methods for purposes of its jurisdictional allocation of FGA/FGB access costs are consistent with the eventual outcome of that proceeding.

[72] The information necessary to resolve these difficult issues was not provided in full until SNET filed its August 18 and August 22, 1986 letters supplementing the original record. We expect that in the future in this proceeding and others SNET will make every effort to present all relevant facts and information at the outset.

[73] *See* MTS/WATS Market Structure, Third Report and order, 93 FCC 2d 241 (1983) (hereinafter *Access Charge Order*), *modified on reconsideration*, 97 FCC 2d 682 (1983) (*First Reconsideration Order*), *modified on further reconsideration*, 97 FCC 2d 834 (1984) (*Second Reconsideration Order*), *aff'd in principal part and remanded in part, Nat'l Ass'n of Regulatory Utility Comm'rs v. FCC*, 737 F.2d 1095 (*D. C. Cir.* 1984), *cert. denied*, 105 S. Ct. 1224, 1225 (1985), *modified on further reconsideration*, 49 Fed. Reg. 46,383 (1984), 50 Fed. Reg. 18,249 (1985) (*Third Reconsideration Order*), *aff'd on further reconsideration*, 102 FCC 2d 849 (1985); *appeal docketed, U. S. Telephone Inc. v. FCC*, No. 84-1115 (D.C. Cir. March 23, 1984).

[74] *First Reconsideration Order*, 97 F.C.C. 2d at 683.

[75] ANI capability was among the technical features available with premium interconnection specifically mentioned by this Commission. *See First Reconsideration Order*, 97 F.C.C. 2d at 726.

[76] *First Reconsideration*, 97 F.C.C. 2d at 728.

[77] *But see supra* para. 10, and SNET's Reply Comments at 12-13.

[78] Report and Order, CC Docket No. 78-72, Phase III, In the Matter of MTS and WATS Market Structure, 100 FCC 2d 860 (1985) (*ITC Equal Access Order*), *recon. denied* Memorandum Opinion and Order, FCC 86-4, released Jan. 8, 1986. The Bell Operating Companies' (BOC's) equal access obligation and schedule derives from the Modification of Final Judgment (MFJ) entered by the U.S. District Court for the District of Columbia in, United States v. American Tel. & Tel. Co., 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub. nom.*, Maryland v. United States, 460 U.S. 1001 (1983). The GTE Operating companies (GTOCs) are required to implement equal access pursuant to a consent decree entered by the same court resolving an antitrust suit brought against GTE Corporation by the Department of Justice in connection with GTE's acquisition of Southern Pacific Communications Company. United States v. GTE Corp., 603 F. Supp. 730 (D.D.C. 1984) (*GTE Consent Decree*).

[79] For ease of reference, we shall use the term "ITC" in this Order to refer to non-GTE ITCs.

[80] ITC end offices equipped with electromechanical switches, while not subject to a specific timetable, are to be converted as soon as practicable. Requests for waiver of the three-year timetable or other conversion requirements may be filed. *ITC Equal Access Order* at paras. 49-50.

[81] SNET Comments at 45.

[82] *See* MCI Reply Comments at 13, n.8.

[83] *See* GTE Sprint Petition at 8 n.12, 24 n.25 and Reply Comments at 29-32; MCI Petition at 6 n.5, 29-33 and Reply Comments at 13 n.8, 23-25.

[84] SNET Comments at 44-46.

[85] The ITC sector is comprised of approximately 1386 operating companies which serve some 10 percent of the nation's access lines. The vast majority of that 10 percent share is served by the operating companies of the ten largest ITCs in terms of revenues, including SNET. *See ITC Equal Access Order* at paras. 31-35. USTA PHONEFACTS '85 and USTA "Holding Company Report For The Year 1985" (1986).

[86] *ITC Equal Access Order* at paras. 43-47. We observed that factors (3) and (4) were particularly likely to be true for the majority of ITCs.

[87] SNET, which is the third largest ITC, by both operating revenues and number of access lines, serves 1.6 million access lines. The average number of lines served by each of the remaining ITCs is approximately 1,300. *Id.* at paras. 31-35, 43-47. *See also* USTA PHONEFACTS '85 at 15.

[88] We referred in particular to end offices with switching equipment that can use the generic software and other equal access conversion facilities that are available "off-the-shelf." *ITC Equal Access Order* at paras. 64-65.

[89] *ITC Equal Access Order* at para. 65, n.59 (quoting from *GTE Consent Decree*, *supra* note 77, at 34 n.61). We note by way of contrast that Woodbury Telephone Company, the other ITC serving customers in Connecticut, is a typical ITC to which the three year schedule clearly applies. That company serves some 12,822 exchange lines and an area that is largely rural. New York Telephone Company (N.Y. Telephone), the only other local exchange carrier providing service in Connecticut, serves approximately 28,000 lines in that state. As a former member of the Bell Operating System, N.Y. Telephone is subject to the equal access obligations imposed by the Justice Department's MFJ, rather than our *ITC Equal Access Order*. N.Y. Telephone has recently completed its equal access conversion in Connecticut pursuant to the MFJ. *See* Bell Communications Research, "Local Exchange Routing Guide, Switching Entities by LATA", Section 5.1, Page 25, June 1, 1986.

[90] We also note with some concern, as do petitioners, that SNET converted its first two end offices only a few months ago and, under its current conversion plan, the bulk of its offices are not scheduled for conversion until late 1987. *See* SNET Comments, Exhibit 3.

[91] Since under SNET's current schedule it would complete conversion of all its offices with SPC equipment by June 1988, the revised schedule we are here proposing would have the effect of accelerating SNET's already planned equal access implementation by approximately 9 months. By proposing this one year schedule, however, we are not foreclosing our option to accelerate SNET's equal access timetable even further should the record established in response to this show cause order establish that a more expedited schedule is feasible.

[92] To the extent SNET will incur additional expenses to accelerate its equal access implementation schedule it should identify the portion of those expenses that would not have been incurred had it adopted such a schedule in its original plan-

ning. We will consider in a subsequent order what the proper treatment of these expenses should be for purposes of SNET's interstate ratemaking.

[93] The Connecticut Act says that each interstate carrier operating in the state, but not authorized to provide intrastate services, must inform its customers through, "billing notices, *advertising campaigns*, customer contacts and other similar methods that it is authorized only to provide interstate common carrier telecommunications service in the state." Connecticut Act, Section (b)(emphasis added). The CDPUC regulations require the IXCs to provide the CDPUC, for its prior approval, the "text(s) of statements to be contained within *Connecticut advertisements* and provided by sales personnel to each prospective customer requesting information," which explicitly state that the IXC is authorized to provide only interstate service in Connecticut. *Decision* at 663 (emphasis added).

[94] The precise scope and meaning of the plan's advertising requirements remain unclear. The terms "advertising campaign" and "Connecticut advertisements" are not defined in the Connecticut Act and CDPUC regulations in which they appear and have not yet been applied, as the plan has been suspended during the pendency of these challenges to its validity. While various parties have speculated as to their reach, the record in this case -- including the comments of the CDPUC -- has failed to provide adequate clarification.

[95] This is so because the advertising/notification practices of carriers directly relating to their provision of interstate communications services would seem to fall within this Commission's ancillary jurisdiction under Title I of the Act. *See, e. g.*, Detariffing of Billing and Collection Services, Report and Order, CC Docket No. 85-88, FCC 86-31 (released Jan. 29, 1986), in which this Commission concluded that while LEC billing and collection for an IXC (*i.e.* third party billing) is not a common carrier communications service for purposes of Title II, it nonetheless remained within the Commission's regulatory reach pursuant to its ancillary jurisdiction under Title I of the Act. This jurisdiction has been interpreted as granting this Commission authority over all things "reasonably ancillary" to its explicit regulatory responsibilities, U.S. v. Southwestern Cable Co., 392 U.S. 157, 178 (1968), such as carrier activities that are deemed to be "intimately related" to common carrier communications services. GTE Service Corporation v. FCC, 474 F.2d 724, 731 (2nd Cir. 1973). Of course, our jurisdiction -- like that of Connecticut -- to regulate the advertising practices of carriers could be subject to certain constitutional limitations. *See infra* note 100.

[96] *See, e.g.*, Memorandum Opinion and Order, Complaint and Petition for Rulemaking Concerning Advertising of Terminal Equipment Registered Under Part 68, RM-4865, Mimeo No. 3028, released Mar. 10, 1986, *application for review denied*, FCC 86-416 (released Oct. 21, 1986), in which the Common Carrier Bureau denied a complaint and petition for rulemaking asking us to prohibit certain allegedly deceptive advertising practices by manufacturers and vendors of Part 68-registered terminal equipment. While the Bureau indicated that we had the authority to promulgate rules dealing with this matter, it declined to do so, in part because it determined that the substance of petitioner's complaint related to issues directly within the jurisdiction of the Federal Trade Commission under 15 U.S.C. § 41 *et seq.*

[97] For example, in Bill Correctors, Ltd. v. GTE-Sprint, File No. E-84-18, Mimeo No. 703 (released Nov. 8. 1984), the Common Carrier Bureau examined OCC practices of notifying their customers of the possibility of erroneous charges for incompleted calls and the procedures for obtaining refunds for such overcharges. While finding that the OCCs had not violated the Act by not detailing such billing matters in their tariffs, the Bureau required the carriers to submit a description of the other notification methods being used to inform their customers for the Bureau's review. Furthermore, this Commission has on several occasions required -- both LECs and IXCs -- to notify their customers of various matters through billing inserts or other means. *See, e.g.* 47 C.F.R. § 61.58 (a)(4)(requiring AT&T to notify its customers of rate increases and certain other matters through written notification, personal contact, or advertising in newspapers of general circulation); Memorandum Opinion and Order, CC Docket No. 83-1145, Phase I, 101 FCC 2d 911 (1985)(requiring LECs to notify customers of availability of equal access through the mailing of Equal Access Ballots); Memorandum Opinion and Order on Reconsideration, CC Docket No. 85-26, FCC 86-341 (released Aug. 7, 1986)(requiring AT&T to inform its WATS and private line customers, through billing insert, of their rights under Commission's customer proprietary network information rules.)

[98] *See* Second Computer Inquiry, 77 FCC 2d 384 (1980), *reconsideration*, 84 FCC 2d 50 (1980), *further reconsideration*, 88 FCC 2d 512 (1981), *aff ' d sub nom.* Computer & Communications Industry Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983), *second further reconsideration*, FCC 84-190 (released May 4, 1984) (Commission preemption of state regulation of CPE upheld even though this Commission had declined to regulate it under Title II).

[99] We also reserve judgment on the issues raised regarding the potential discriminatory application of the advertising requirements. The record does not tell us precisely how the requirements will apply to AT&T.

[100] We herein express no opinion on the question of whether the Connecticut advertising restrictions violate the First Amendment of the U. S. Constitution. Such matters are outside the scope of the Communications Act issues we have been asked to address in the declaratory ruling requests before us, and we leave such constitutional issues for resolution by the district court that directed the petitioners to file their declaratory ruling requests with this Commission.

[101] In light of our decisions in this Order (a) not to preempt the Connecticut compensation plan for unauthorized intrastate calling, and (b) to propose that SNET be required to accelerate its implementation of equal access, Connecticut and the CPDUC may decide that a broad implementation of the advertising restrictions is unnecessary.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

MM Docket No. 86-401

In re Applications of

Companion Broadcasting
Service Inc. File No. BPH-840919JC
(hereafter Companion)
Andalusia, Alabama
Req: 104.7 MHz, Channel 284A;
3.0 kW (H & V), 100 meters

Jeffery Jerome Jackson
and Michael Purnell File No. BPH-841228MG
d/b/a Jackson-Purnell
Broadcasting Company
(hereafter Jackson-Purnell)
Andalusia, Alabama
Req: 104.7 MHz, Channel 284A;
3.0 kW (H & V), 91 meters

For Construction Permit
for a New FM Station

HEARING DESIGNATION ORDER

Adopted: October 14, 1986 Released: October 29, 1986

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. Jackson-Purnell filed minor amendments to its application on April 30, 1985 and June 24, 1985. The amendments were filed after the "B" cut-off date, the last date for filing minor amendments as of right. Under 47 C.F.R. § 1.65, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

3. Data submitted by the applicants indicate that there would be significant differences in the size of the area and population which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to either applicant.

4. A Notice of Proposed Rulemaking (MM Docket No. 86-351) is currently pending before the Commission proposing to move station WAAZ(FM), Crestview, Florida, from Channel 285 A to Channel 284 C2. In order for this to be accomplished, the proposed allocation in Andalusia, Alabama on Channel 284 A is proposed to be moved to 262 A. Accordingly, the applicants in this proceeding will be required to submit the appropriate engineering data to the presiding Administrative Law Judge should the resolution of the rulemaking proceeding result in the move of the Andalusia allotment from 284A to 262A.

5. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

6. Accordingly, IT IS ORDERED, That, pursuant to 47 U.S.C. § 309(e), the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.
2. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

7. IT IS FURTHER ORDERED, That the amendments filed by Jackson-Purnell on April 30, 1985 and on June 24, 1985 ARE ACCEPTED to the extent indicated herein.

8. IT IS FURTHER ORDERED, That the applicants shall submit the appropriate engineering data, discussed in § 4, to the Administrative Law Judge, if necessitated by the resolution of the rulemaking proceeding in Docket 86-351.

9. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

10. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to 47 C.F.R. § 1.221(c), in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

11. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to 47 U.S.C. § 311(a)(2) and 47 C.F.R. § 73.3594 give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by 47 C.F.R. § 73.3594(g).

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

CC Docket No. 86-400

In re Applications of

ZIP-CALL, INC. File No. 24405-CD-P/L-3-85

For authorization to establish additional facilities for Station KCI297 on frequency 454.175 MHz in the Public Land Mobile Service at Agamenticus Village, Portland, and Saco, Maine

MARSHALL COMMUNICATIONS CORP. File No. 23126-CD-P/L-1-85
File No. 22889-CD-P/L-1-85

For authorization to establish facilities on frequency 454.175 MHz in the Public Land Mobile Service for Station KNKI563 at Auburn, Maine and for Station KNKI514 at Saco, Maine

SUMMIT MOBILE RADIO COMPANY File No. 24440-CD-P/L-1-85
File No. 24444-CD-P/L-1-85

For authorization to establish facilities on frequency 454.175 MHz in the Public Land Mobile Service for Station KNKI893 at Androscoggin, Maine and for Station KNKI901 at Falmouth Township, Maine

ORDER DESIGNATING APPLICATIONS FOR HEARING

Adopted October 14, 1986; Released October 29, 1986

By the Common Carrier Bureau:

1. On August 12, 1985, Zip-Call, Inc. filed an application to establish additional transmitting facilities for Station KCI297 on frequency 454.175 MHz at Agamenticus Village, Portland and Saco, Maine. The application was accepted for filing on September 25, 1985. Marshall Communications Corp. and Summit Mobile Radio Company also timely filed mutually exclusive applications, which were likewise accepted for filing. These applications have not been protested. On January 15, 1986, the Commission issued a Public Notice that these applications were mutually exclusive.

2. On February 14, 1986, Zip-Call, Inc. timely filed a Petition for Comparative Hearing.[1] The petition was not opposed. The petition established that Zip-Call, Inc. had a co-channel station within 40 miles of its proposed transmitter location, provided an adequate demand by existing subscribers for the expanded service for the Agamenticus Village, Maine proposal, and demonstrated that the public interest would be served by a comparative hearing pursuant to Section 22.33(c) of the Commission's Rules, *Random Selection Lotteries* , Gen. Docket No. 81-768, 93 FCC 2d 952 (1983), *recon .granted in part*, FCC 84-596, released December 4, 1984. Accordingly, the above-captioned mutually exclusive applications will not be subject to selection by lottery, and a comparative hearing will be held to determine which application would serve the public interest.

3. Accordingly, IT IS ORDERED, that the applications of Zip-Call, Inc., (File No. 24405-CD-P/L-3-85); Marshall Communications Corp., (File Nos. 23126-CD-P/L-1-85, 22889-CD-P/L-1-85); and Summit Mobile Radio Company, (File Nos. 24440-CD-P/L-1-85, 24444-CD-P/L-1-85), ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING pursuant to Section 309(e) of the Communications Act of 1934, as amended upon the following issues: (a) to determine on a comparative basis, the nature and extent of service proposed by each applicant, including the rates, charges, maintenance, personnel, practices, classifications, regulations, and facilities pertaining thereto; (b) to determine on a comparative basis, the areas and populations that each applicant will serve within the prospective interference-free area within the 39 dBu contours,[2] based upon the standards set forth in Section 22.504(a) of the Commission's Rules[3] and to determine and compare the relative demand for the proposed services in said areas; and (c) to determine, in light of the evidence adduced pursuant to the foregoing issues, what disposition of the referenced applications would best serve the public interest, convenience, and necessity.

4. IT IS FURTHER ORDERED, that the hearing shall be held at a time and place and before an Administrative Law Judge to be specified in a subsequent Order.

5. IT IS FURTHER ORDERED, that the Chief, Common Carrier Bureau, is made a party to the proceeding.

6. IT IS FURTHER ORDERED, that the applicants may avail themselves of an opportunity to be heard by filing with the Commission pursuant to Section 1.221 of the rules within 20 days of the release date hereof, a written notice stating an intention to appear on that date for a hearing and present evidence in the issues specified in the Memorandum Opinion and Order.

7. This Order is issued under Section 0.291 of the Commission's Rules and is effective upon its release date. Petitions for reconsideration will not be entertained. *See* Section 1.106(a)(1) of the Rules. Applications for review will be entertained pursuant to Section 1.115(e)(3). *See* also Section 1.4(b)(2) of the Rules.

8. The Secretary shall cause a copy of the summary of this order to be published in the Federal Register.

Kevin J. Kelley

Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] Also pending is Summit Mobile Radio Company's (Summit) unopposed Petition for Designation of Hearing, filed February 14, 1986. Since we are granting Zip-Call, Inc.'s petition, there is no need to pass on Summit's petition, and it is accordingly now moot.

[2] For the purpose of this proceeding, the interference-free area is defined as the area within the 39 dBu contour as calculated from Section 22.504, in which the ratio of desired-to-undesired signal is equal to or greater than R in FCC Report No. R-6404, equation 8.

[3] Section 22.504(a) of the Commission's Rules and Regulations describes a field strength contour of 39 decibels above one microvolt per meter as the limits of the reliable service area for base stations engaged in two-way communications service on frequencies in the 450 MHz band. Propagation data set forth in Section 22.504(b) are the proper bases for establishing the location of service contours F(50,50) for the facilities involved in this proceeding. (The applicants should consult with the Bureau counsel with the goal of reaching joint technical exhibits.)

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Parts 15, 68 and 76
of the Commission's Rules to
Require Labelling of Home Electronic
Equipment and Systems Susceptible to
Interference from Radio Frequency
Energy

MEMORANDUM OPINION AND ORDER

Adopted: October 6, 1986 **Released: October 29, 1986**

Background

1. A petition for rule making was filed by the American Radio Relay League, Inc. (ARRL) with the Chief Engineer on April 22, 1986. The petition requested amendment to several parts of the Commission's Rules in order to require that a label be attached to home electronic devices. That label would indicate whether or not the device incorporates shielding, filtering or circuitry designed to reduce the susceptibility of the device to radio frequency interference (RFI).

2. On May 20, 1986, the Chief Engineer, acting under delegated authority pursuant to Section 0.241 of the Commission's regulations, dismissed the subject petition. The petition failed to take into account the need to establish criteria or standards to permit a qualitative assessment of the RFI susceptibility of a home electronic device. The Chief Engineer also deemed the petition to be premature since the susceptibility of home electronic devices to RFI is currently being addressed by an Ad Hoc Committee instituted by the American National Standards Institute (ANSI).

Petition for Reconsideration

3. In response to the Chief Engineer's dismissal of the petition for rule making, the ARRL filed a Petition for Reconsideration on June 19, 1986. In that Petition, the ARRL asserts that RFI susceptibility standards are not required to implement their proposed rule making because the manufacturer would know if any attempt to incorporate RFI rejection in the device had been made. Alternatively, the ARRL proposes that the tentative values of RFI susceptibility suggested by the Ad Hoc Committee be used as decision criteria for labelling home electronic devices. (ARRL added that it is a participant in the Ad Hoc Committee and takes issue with the suggested values of that Committee. As stated in their petition, Thus far the Committee has decided to recommend an RF immunity standard which the League has determined to be insufficient, even if adhered to by the industry.) The ARRL also expresses doubt that voluntary compliance by the industry will be effective.

4. For devices which do not contain RFI suppression circuitry the ARRL proposes the use of a label which explicity advises the user that the device is not intended to function in the presence of a nearby transmitter producing high rf fields. If the device does contain RFI suppression circuitry the ARRL proposes a label which advises the user that the device is designed to operate properly in the presence of rf fields from a nearby transmitter, but that these design features may not guarantee satisfactory performance. In either case, the proposed labels advises the user to contact the manufacturer or retailer for assistance in resolving RFI problems. The petition states: A review of the wording of the two alternative labels makes it apparent that a choice between them requires no threshold engineering evaluation, but rather a factual assertion one way or another. Either way, the consumer is informed that an appropriate means of commencing the interference resolution process is at the manufacturer's door step, rather than that of the Commission or the Amateur.

Discussion

5. The ARRL has stated that the aim of the proposed rule making is public education on the subject of RFI responsibility. However, the implications of labelling home electronic devices or systems as employing or not employing RFI immunity features go far beyond public education. Such a labelling program could imply that a standard had been developed that would assure the proper functioning of a home electronic device in the proximity of a properly operating licensed transmitter. This implied assurance could complicate the resolution of RFI problems involving home electronic devices.

6. The Commission's Rules, require labelling on some equipment to demonstrate a capability to comply with the appropriate standard in the regulations. For example, equipment which is certified for use under Part 15 is required to be labelled to indicate that the device complies with the applicable technical requirements of Part 15. These standards have been developed on measurable quantities using industry recognized test procedures to ensure the repeatability of such measurements. The labelling requirement requested by the ARRL is not based on any similar standards.

7. The Ad Hoc Committee which has been established to review home electronic device susceptibility to RFI is continuing its efforts with due dispatch and is moving in the desired direction of an industry developed standard with voluntary compliance. The Commission will continue to monitor the effectiveness of the efforts of the Ad Hoc Committee. If it is found that voluntary efforts are not yielding an adequate degree of RFI susceptibility control within a reasonable time frame, the Commission may then consider mandatory standards and a means of enforcing such standards. Intervention in the matter, absent a clear need to do so, would therefore appear to be premature.

8. Accordingly, IT IS ORDERED THAT the Petition for Reconsideration of the May 20, 1986 decision by the Chief Engineer IS DENIED. IT IS FURTHER ORDERED that the earlier ruling by the Chief Engineer IS AFFIRMED.

Federal Communications Commission

William J. Tricarico
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

BY DIRECTION LETTER

Adopted: October 15, 1986 Released: October 29, 1986

WFLI, Inc.
621 O'Grady Drive
Chattanooga, Tennessee 37409

Re: BMPCT-851112KM
Station WFLI-TV
Cleveland, TN

Gentlemen:

This refers to the application of WFLI, Inc., permittee of unbuilt Station WFLI-TV, Cleveland, Tennessee, for modification of the construction permit to change WFLI-TV's transmitter location, effective radiated power, and antenna height above average terrain.

WFLI, Inc. is also the licensee of Station WFLI(AM), Lookout Mountain, Tennessee, and holds a 100% interest in W.S.I.M., Inc., licensee of Station WJTT(FM), Red Bank, Tennessee.[1] Because the proposed modification will result in the Grade A contour of WFLI-TV encompassing Lookout Mountain and Red Bank,[2] the application is subject to the Commission's "one-to-a-market" rule, Section 73.3555(b), which generally prohibits common ownership of aural stations and television stations in the same market. However, Note 4 to Section 73.3555 provides that applications for UHF television stations will be considered on a case-by-case basis in order to determine whether common ownership, operation, or control of the stations in question would be in the public interest.

In support of your request, you note that Lookout Mountain and Red Bank are suburbs of Chattanooga, and that Cleveland is located approximately 25 miles from Chattanooga and is part of the Chattanooga market. You point out that WFLI-TV will be the first television station to be licensed to Cleveland, whereas Chattanooga is served by four full-service commercial television stations (WDEF-TV, channel 12 (CBS); WRCB-TV, channel 3, (NBC); WTVC(TV), channel 9 (ABC); and WDSI-TV, channel 61 (IND)). The Chattanooga stations, you state, are carried on the Chattanooga and the Cleveland cable systems. The Chattanooga system has a 58% cable penetration and Cleveland has a 65% cable penetration.[3]

You argue that a denial of your application would prevent WFLI-TV from being received in Chattanooga either off-air or via cable, and would jeopardize its ability to compete effectively for advertising dollars and destroy its viability. You maintain that all of WFLI's competitors provide a quality signal to Cleveland and to Chattanooga. You note that Cleveland is a small town having a population of 26,222, and is located in Bradley County which has a population of 66,619. Chattanooga has a population of 160,535, and is located in Hamilton County which has a population of 282,563. You state that sufficient revenues cannot be generated from Cleveland and Bradley County to support a full-service commercial television station. Bradley County, you assert, has experienced a higher unemployment rate than either the State of Tennessee or the nation as a whole. For July of 1985, Bradley County's unemployment rate was 10.4% compared to 8.7% for Tennessee and 7.4% for the United States.

You contend that WFLI-TV's potential economic peril is compounded by the Court of Appeals' recent decision that the Commission's "must carry" rules are unconstitutional. You state that it is unlikely that WFLI will be able to supplant an established local television or a popular imported signal. Station WFLI-TV proposes a "non-conventional" format consisting of religious, and public affairs programming, local news, local sporting events, and syndicated programs. A survey conducted by the National Association of Television Programming Executives, you assert, revealed that managers and licensees of television stations believe that because of the deletion of the "must carry" rules, "program budgets will be squeezed and public broadcasting, educational, and religious broadcasters will suffer." You observe that in Kokomo, Indiana, the Commission recognized the necessity of joint radio and television station ownership in a situation where the proposed city of license was significantly larger than Cleveland. *See B. G. S. Broadcasting, Inc.*, FCC 84D-44, released June 15, 1984. Compared with Kokomo, you state that Cleveland is a much smaller community, and that there are only 133,900 television households in Bradley and Hamilton Counties combined. You estimate that WFLI-TV's operating expenses from the proposed site for the first four years of operation would be $850,000, $950,000, 1,000,000 and 1,075,000, respectively. From the authorized site, you estimate that the operating expenses for the first four years would be $875,500, $978,500, $1,030,000 and $1,107,250. Based upon your knowledge of the area and the broadcast industry, you estimate that revenues derived through operation from the proposed site for the first four years would be $564,000, $620,400, $682,440 and $750,684. Thus, from the proposed site, you assert, WFLI would suffer a projected loss of $1,257,476 over a four-year period. In contrast, from the authorized site, you estimate that revenues for the first four years would be $282,000, $310,200, $341,220, and $375,342, with a projected loss of $2,682,488. You point out that proceeds from the sale of WJTT(FM) and profits from the operation of WFLI(AM) would be used to offset the projected losses that would be generated by WFLI-TV.

You argue that a grant of your waiver request would not result in an undue concentration of control because the market is served by 4 television stations, 25 aural stations, 3 daily newspapers, and 2 cable systems. You note that the Commission has granted several radio/UHF combinations in markets which are larger than Cleveland where it found that common ownership of the stations was justified by the small size of the market, citing *inter alia*, *Television Corporation of Virginia*, 43 RR 2d 231 (1978); *American Public Life Broadcast Co.*, 36 RR 2d 1181 (1976); *Central Broadcasting Co., Inc.*, 21 RR 2d 482 (1971). You aver that WFLI-TV will provide the area with a unique programming voice by broadcasting religious programs. None of the area existing stations, you state, broadcast religious programs from Monday through Saturday. You note that Bradley County serves as the world headquarters for two international church groups. Moreover, you state that WFLI-TV is controlled and will be managed by two individuals, one of whom is a minority female, who are long-time residents with many years of broadcast experience.

Based upon the above representations, we conclude, under the circumstances of this case, that the aural/UHF television combination would be consistent with the public interest and precedents. Chattanooga is the 80th largest market. WFLI-TV, which will be the first television station to be licensed to Cleveland, must compete with the four television stations licensed to Chattanooga for advertising revenue. Each of the Chattanooga stations provides coverage to Cleveland and is carried on the Cleveland and Chattanooga cable systems.

Information submitted by WFLI-TV indicates that it will be operating at a deficit over the next four years. However, from the proposed site the projected loss would be far less because the station would be able to reduce expenses and attract advertising revenues from Chattanooga and Cleveland. The continued viability of WFLI-TV will be dependent upon its coverage of both cities and upon its ability to utilize the profits generated from the operation of WFLI(AM) to offset its losses. Moreover, the grant of WFLI-TV's application would foster the development of Cleveland's first local television station, and would contribute to the diversity of programming available in the market. In view of the many other media services available, no concentration of control of the media will result from grant of this application. Because of our decision in this matter, we need not consider other arguments raised by the applicant in support of its showing.

We find that a grant of the application will serve the public interest. Accordingly, your application for modification of the construction permit to change WFLI's transmitter location, effective radiated visual power, and antenna height above average terrain, IS GRANTED.

BY DIRECTION OF THE COMMISSION

William J. Tricarico
Secretary

cc: Linda J. Eckard, Esquire

FOOTNOTES

[1] You amended your modification application on July 14, 1986, stating that WSIM, Inc. has entered into a contract to sell WJTT(FM). The assignment application was filed on July 18, 1986.

[2] WFLI(AM)'s and WJTT(FM)'s service contours do not encompass Cleveland.

[3] The cable systems carry the following stations: WDEF-TV (CBS), Chattanooga; WRCB-TV (NBC), Chattanooga; WDSI-TV, Chattanooga (IND); WTCI(TV), Chattanooga (ETV); WTVC (ABC), Chattanooga; WTBS(TV), Atlanta, Georgia (IND); WCLP-TV, Chatsworth, Georgia (TV); and WGN-TV, Chicago, Illinois (IND). These systems also carry three movie channels, Disney Channel, USA Network, Nickelodeon, Lifetime, CBN, MTV, CNN, and others.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of

Frequency Coordination Procedures for the Broadcast Auxiliary Services; Part 74, Subparts D, E, F, and H.	RM-5179

MEMORANDUM OPINION AND ORDER

(Proceeding Terminated)

Adopted: October 16, 1986; Released: October 29, 1986

By the Commission:

1. The Commission has before it a Petition for Rule Making (Petition) submitted by the Society of Broadcast Engineers (SBE), and the comments and reply comments filed in response thereto.[1] The Petition requested amendment of Part 74, Subparts D, E, F, and H of the Rules to require all applicants for Broadcast Auxiliary Service (BAS) stations to certify that they have: 1) coordinated their requested frequencies with local area users or with the local frequency coordination committee (LFCC); or 2) ascertained through other means that the channel is available on a non-interference basis to existing users.

2. Hubbard's comments supported the Petition citing an example of an applicant who did not coordinate frequencies prior to filing and selected frequencies which would have resulted in interference. SBE commented that some entities have not felt the need to work through the existing voluntary LFCCs, which created interference concerns to BAS users.

3. NAB urged that the Commission set aside the Petition without prejudice or, in the alternative, begin a Notice of Inquiry to gather additional public comment on BAS frequency coordination issues. NAB further commented that current rules appear to accommodate SBE's concerns and that a sufficiently strong showing of need for further regulation has not been shown. SBE, in its reply comments, contested NAB's assertions and suggested that the certification as requested in the Petition is not a burden on licensees.

DECISION

4. Upon review of the record, the Commission believes that existing *voluntary* BAS local frequency coordination efforts have been highly successful in achieving effective spectrum usage. We are aware of only a few isolated problems related to frequency coordination, and all of these were resolved by the affected parties without Commission intervention. Moreover, current rules already require that frequencies be selected and operations be scheduled so as to avoid mutual interference to other stations.[2] In view of the above, the certification, as requested in the Petition, would be unnecessarily burdensome on licensees. Therefore, we decline to proceed with the requested rule making at this time and dismiss the Petition without prejudice. We continue to encourage the existing high level of user cooperation and coordination in selecting and sharing frequencies in the BAS bands. In this regard, we accept NAB's suggestion that a broad Notice of Inquiry (Inquiry) be opened to collect comments on the overall licensing process in the BAS channels. This Inquiry is issued in a separate proceeding.[3]

ACTIONS

5. Accordingly, IT IS ORDERED THAT the SBE Petition for Rule Making IS DISMISSED without prejudice. IT IS FURTHER ORDERED THAT this proceeding IS TERMINATED.

6. Authority for the actions taken herein is contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended.

7. Further information on this proceeding may be obtained by contacting Hank VanDeursen, Mass Media Bureau, (202) 632-9660. .m0

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

FOOTNOTES

[1] Comments were submitted by: Hubbard Broadcasting, Inc. (Hubbard); National Association of Broadcasters (NAB); and SBE. A reply comment was submitted by SBE.

[2] *See* §74.24, §74.403, §74.604, and §74.803.

[3] *See Notice of Inquiry* in Mass Media Docket No. 86-405, FCC 86-453 (adopted October 16, 1986).

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

BY DIRECTION LETTER

Adopted: October 16, 1986 Released: October 29, 1986

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Gentlemen:

This refers to the application (BTCCT-860605KE) for Commission consent to transfer control of Channel 19, Inc., licensee of television station WOIO, Channel 19, Shaker Heights, Ohio, from Diamond Broadcasting, Inc. and Metroplex Communications to Malrite Communications Group, Inc. (Malrite).[1]

You note that Channel 19 was allocated in 1952. Three permits were granted to various entities; however, the station was never built and the last permit was cancelled in 1977. Channel 19, Inc. applied in 1978, and received its grant after a comparative hearing, by decision released May 18, 1983. The decision was appealed to the United States Court of Appeals, which affirmed the Commission's decision. *See Cleveland Television Company v . Federal Communications Commission*, 732 F. 2d 962 (D.C. Cir. 1984). The station commenced operation on May 19, 1985.

You state that the current ownership of Channel 19 involves three separate groups, namely: Diamond Broadcasting, Inc., headed by a black broadcaster, Hubert Payne (33 1/3% of the total equity and 50% of the common voting stock); Metroplex Communications (33 1/3% of the total equity and 50% of the common voting stock); and Milton Maltz, John R. Wilson, and Carl E. Hirsh (33 1/3% of the total equity, no common stock).[2] Pursuant to the subject transaction, Malrite will purchase 51% of the common voting stock of Channel 19 and 51% of the non-voting preferred stock. Malrite is also licensee of Stations WHK(AM) and WMMS-FM, Cleveland, Ohio. Because the proposed transaction would combine aural and television stations located in the same market under common ownership, the application is subject to the Commission's one-to-a-market rule, Section 73.3555(b), which generally prohibits common ownership of aural broadcast stations and television stations located in the same market. However, Note 4 to Section 73.3555 provides that applications for UHF television stations will be considered by the Commission on a case-by-case basis in order to determine whether common ownership, operation or control of the stations in question would be in the public interest.

In support of your request, you observe that the following difficulties have plagued WOIO since it applied for its construction permit:

(1) five years of protracted and expensive litigation substantially exceeded projected legal costs;
(2) discovery of serious coverage deficiencies from the proposed WOIO transmitter site required additional unanticipated expenditures of $872,000;
(3) an increase, in 1984 and 1985, in program acquisition costs resulted in the licensee having to agree to $24 million in program contracts, with payment on some of the contracts beginning six months before operation commenced; and
(4) unavoidable delays in the transmitter site preparation caused a delay in the projected on-air date.

Concerning the station's financing, you assert that shortly after receiving the permit, Channel 19 initiated negotiations to finalize the financing package for WOIO with a variety of major financing sources. Channel 19 had projected that funds in the amount of $10,000,000 would be needed to cover the operations of WOIO and that the station would be profitable by 1987. You claim that potential investors and financial institutions were discouraged from investing in Channel 19 because it would be a "stand alone" UHF station and the third independent television station in the highly competitive Cleveland market. By early 1985, Channel 19 reached an agreement with AmeriTrust to provide a loan. AmeriTrust, however, required an additional source of subordinated funds to protect itself. Since a back-up source could not be found, Channel 19 and AmeriTrust entered into negotiations with Malrite. Malrite agreed to issue an irrevocable standby letter of credit in the amount of $2,000,000, in exchange for an option to purchase 51% of the outstanding shares of Channel 19 for $1,500,000, subject to FCC approval. By the end of 1985, the cash flow loss, coupled with capital costs and start-up costs, amounted to $9,408,000 and nearly exhausted the entire AmeriTrust loan. Further, you state that the cash flow loss of $839,850, in the first quarter of 1986, completely depleted the AmeriTrust loan and required Channel 19 to draw on the Malrite line of credit. Because the AmeriTrust funds have been depleted and since the balance of the Malrite line of credit will be exhausted shortly, you claim that Channel 19 is facing an immediate and severe financial crisis. Due to the competitive conditions in Cleveland, and the many UHF signals received in that market, you state that there is "no known buyer" for a Cleveland UHF property. You observe that Channel 61 has been for sale for some time and that other properties in the market are available. Thus, you contend that this transaction affords Channel 19 the only viable solution to its financial crisis. While the financial burden on the new operator will be substantial, and long-term indebtedness is currently approximating $12,000,000, you assert that Malrite is willing to accept this responsibility. Furthermore, AmeriTrust endorses the proposed transfer and is committed to cooperating with Malrite in working out financial arrangements critical to Malrite's business plans for maintaining WOIO's viability in Cleveland. You also contend that Malrite, the owner of 5 television stations, has the resources, management skills and experience needed to develop WOIO into a viable Cleveland competitor, and will provide quality programming to the market.

Moreover, you maintain that the Cleveland market is served by a plethora of media outlets. It is served by several newspapers and 14 television stations (3 VHF's

and 11 UHF's).[3] There is a 44% cable penetration, and a new MDS service providing 10 channels of video programming. Twenty-five radio stations serve the Cleveland market directly, and another 47 radio stations serve portions of the market. Therefore, you argue that because of the quantity and variety of media outlets serving the Cleveland market, the combined ownership of WOIO(TV), WHK(AM) and WMMS-FM will not have anti-competitive consequences. Malrite pledges to operate its radio stations and WOIO as separate and independent properties. However, WOIO will have available financial resources from the co-owned radio stations to help support its operations.

The basic principles embodied in the Commission's multiple ownership rule, Section 73.3555, and the notes thereto, are to promote diversity of ownership in order to maximize the diversification of viewpoints as well as to prevent any undue concentration of economic power contrary to the public interest. *See Multiple Ownership Rules*, 22 FCC 2d 306, 311 (1970), *recon . granted in part*, 28 FCC 2d 662 (1971). The Commission is not, however, without flexibility to respond to situations where application of fixed multiple ownership standards would be contrary to other public interest concerns, in some cases waiving the rules in order to achieve appropriate and desirable improvements of service. *See, Capital Cities Communications , Inc .*, 59 RR 2d 451 (1985). Before such a waiver can be granted, an applicant must sustain the burden of showing that the benefits to be achieved by a proposal outweigh any detriments which may occur to the policies underlying the rule to be waived. However, in the case of UHF television service, the note 4 exception to Section 73.3555 exists precisely to provide a mechanism for addressing, on a case-by-case basis, those situations where it can be shown that common ownership of radio and UHF television stations in the same market will ensure or foster the development, viability or operation of a particular UHF service. Thus, application of Note 4 is a means of applying, not waiving, Section 73.3555. Based on the above representations, we conclude, under the circumstances of this case, that the aural/UHF television combination would be consistent with the public interest and precedents. Cleveland, the 11th largest market with 1,392,300 television homes, is a highly competitive market that is served by a variety of diverse media sources. Thus, our grant of the subject application will not result in any undue concentration of control. Moreover, we note that, as a full service, independent UHF station, WOIO has sustained substantial losses, and currently is in critical need of additional financing. The station's long-term indebtedness is at $12,000,000, and it has film commitments in the amount of $24,000,000. Given all these circumstances, we conclude that grant of this application will permit WOIO to draw upon the skilled management and financial resources of the experienced local broadcaster. Malrite's commitments will maintain the diversity of the video programming available in the market.

Therefore, having found the applicants fully qualified, the application (BTCCT-860605KE) transferring control of Channel 19, Inc., licensee of television station WOIO, Shaker Heights, Ohio, from Diamond Broadcasting, Inc. and Metroplex Communications to Malrite Communications Group, Inc., IS GRANTED, and the petition to deny filed by Channel Communications of Ohio, Inc., IS DISMISSED.

BY DIRECTION OF THE COMMISSION

William J. Tricarico
Secretary

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FOOTNOTES

[1] Channel Communications of Ohio, Inc., licensee of Station WCLQ(TV), Channel 61, Cleveland, Ohio, filed a petition to deny the application. Subsequently, on August 6, 1986, it requested that its petition be withdrawn. We have, however, fully considered the matters set forth in the petition and conclude that there are no substantial and material questions of fact that would require further inquiry.

[2] Milton Maltz and John R. Wilson are principals of Malrite.

[3] The Cleveland market is served by the following television stations: WKYC-TV, Channel 3 (NBC), Cleveland; WEWS(TV), Channel 5 (ABC), Cleveland; WJW-TV, Channel 8 (CBS), Cleveland; WDLI, Channel 17 (IND), Canton; WOIO, Channel 19 (IND), Shaker Heights; WAKR-TV, Channel 23 (ABC), Akron; WUAB(TV), Channel 43 (IND), Lorain; WGGN-TV, Channel 52 (IND), Sandusky; WBNX-TV, Channel 55 (IND), Akron; WCLQ(TV), Channel 61 (IND), Cleveland; WOAC(TV), Channel 67 (IND), Canton; WVIZ-TV, Channel 25 (ETV), Cleveland; WNEO-TV, Channel 45 (ETV), Alliance; and WEAO(TV), Channel 49 (ETV), Akron, all Ohio.

Before the
Federal Communications Commission
Washington, D.C.20554

In re Applications of

WHW ENTERPRISES INC. DOCKET NO. 21374
Kalamazoo, Michigan File No. BPH-9878

RADIO PORTAGE, INC. DOCKET NO. 21375
Portage, Michigan File No. BPH-10,211

THE AIR-BORNE
GROUP, LTD. DOCKET NO. 21376
Portage, Michigan File No. BPH-10,239

James R. Searer, DOCKET NO. 21377
James M. Searer and File No. BPH-10,241
Susan L. Homan d/b/a
SEAR BROADCASTING COMPANY
Portage, Michigan

For Construction Permits

MEMORANDUM OPINION AND ORDER

Adopted: October 20, 1986; Released: October 29, 1986

By the Commission:

BACKGROUND

1. In this comparative FM broadcast proceeding, the Review Board determined that Portage, Michigan was in greater need of a new radio service than Kalamazoo, Michigan, and that the three Portage applicants were therefore entitled to a dispositive preference under Section 307(b) of the Communications Act of 1934, as amended. The Board reversed the Presiding Judge's disqualification of Radio Portage, Inc. (RPI), exonerating its president and sole owner, Emil J. Popke, from all charges of misrepresentation and lack of candor. The Board then concluded that RPI was the preferred Portage applicant by virtue of its superior integration of ownership and management. The Commission denied review of the Board's Decision.[1] Subsequently the United States Court of Appeals for the District of Columbia Circuit affirmed the dispositive preference awarded to the Portage applicants under Section 307(b) of the Communications Act, but remanded the case for a determination, consistent with the Court's opinion, of an appropriate sanction to be imposed on RPI for what the Court characterized as Popke's lack of can,or and material misrepresentations in connection with RPI's application.[2]

2. The applicants were requested to submit comments as to what action would be appropriate on remand. [3] WHW Enterprises, Inc. (WHW), The Air-Borne Group, Ltd. (Air-Borne), and RPI filed their comments on August 13, 1985. Sear Broadcasting Company (Sear) filed its comments on August 17, 1985, and its reply comments on August 22, 1985. Air-Borne and RPI filed their reply comments on September 4, 1985. Air-Borne filed a Petition to Expedite Court Ordered Remand Proceedings [4] on February 13, 1968. RPI filed comments on the foregoing petition on February 25, 1986, to which Air-Borne filed a reply on March 7, 1986. RPI filed a Petition for Leave to File Rejoinder and a Rejoinder to Air-Borne Reply [5] on March 28, 1986 and Air-Borne filed comments on RPI's petition on April 10, 1986. After having examined the applicants' comments and the record evidence, we conclude that Air-Borne,s application for authority to construct a new FM station at Portage, Michigan, should be granted and the other applications should be denied. We shall explain our disposition in greater detail below.

RPI'S QUALIFICATIONS

3. The Board determined that the two front-runners in this proceeding were Air-Borne and RPI, both of whom propose 100 percent integration of ownership and management and neither of whom has any other mass media interest. The Board preferred RPI based upon its superior qualitative enhancements. The only real issue in this case is to determine whether or not RPI should receive a decisionally significant demerit for making misrepresentations and lacking candor in its dealings with the Commission. [6]

4. The factual background for the misrepresentation/lack of candor issues designated against RPI is as follows. Emil J. Popke, who owns 100 percent of RPI, formerly owned the licensee of Station WYYY in Kalamazoo, Michigan. After he sold Station WYYY in 1979, a new round of discovery efforts by Air-Borne and Sear ensued, purportedly to ascertain the degree to which Popke's income consisted of monthly payments on the note he obtained from the sale of that station and whether that note was Popke's major asset. Air-Borne and Sear apparently hoped that their efforts would eventually lead to a conclusion that Station WYYY should still be imputed to RPI for diversification of mass media ownership purposes, because of Popke's continuing interest in that station. *See* 89 F.C.C. 2d at 862. In rebuttal, RPI submitted its Exhibit 7, which lists Popke's assets, liabilities and sources of income. Exhibit 7 demonstrated that Popke had sources of income other than the note from Station WYYY's sale and listed real estate holdings with a total value of $430,000, which exceeded the $340,000 station note. In response to Sear's subsequent motion to reopen the record and enlarge issues, which demonstrated that Popke did not hold title to the real estate listed on his balance sheet, the ALJ added issues against RPI to determine whether it misrepresented or lacked candor in its submission of Exhibit 7.

5. RPI admitted that Popke's sisters had title to the land in question, but Popke asserted that he had listed the property as his because he had always been the beneficial owner of the property, and because his local attorney, Quinn Benson, who is also the Secretary-Treasurer and a Director of RPI, advised Popke that he could list the property as his asset. In 1970, when Popke transferred the property to his sisters, they agreed to hold title to the land on his behalf and return record title to him whenever he so requested. 89 F.C.C. 2d at 863. When Popke transferred title to the property to his sisters, he was experiencing serious financial difficulties and seeking loans for which potential lenders were demanding security. Popke testified that he was trying to avoid bankruptcy so that creditors would receive what they were owned, but that he wished to keep the land from becoming collateral for the necessary loans, thereby preserving this asset against possible default and providing him with some reserve borrowing power. 89 F.C.C. 2d at 865.

6. The ALJ concluded that Popke's transfer of title to his real estate was a sham designed to place his property beyond the reach of his existing creditors and to defraud them, and that the testimony of Popke and Benson lacked candor because they refused to concede any improper motives or wrongdoing on Popke's part concerning the 1970 transfer. 89 F.C.C. 2d at 878 79. The ALJ also found that Popke's listing of the real estate as his own was "an attempt to create an impression designed to mislead the Commission," and he disqualified RPI. 89 F.C.C. 2d at 879.

7. The Review Board ruled that the ALJ's conclusions that the 1970 land transfer defrauded Popke's creditors were unproven and beyond the scope of the Commission's inquiry. Thus, the Board determined that, although the ALJ properly examined the circumstances surrounding the preparation and submission of RPI's Exhibit 7, the ALJ should not have examined Popke's intent and purposes in transferring the property and that his findings concerning the propriety of Popke's business practices were also beyond the proper scope of Commission inquiry. In this regard, the Board noted that the Commission traditionally declines to examine alleged violations of local or federal law by applicants unless the alleged violations have been brought to the attention of the relevant governmental authority and that the 1970 property transfer had never been brought to the attention of the Michigan authorities. Further, the Board ruled that, although the 1970 property transfer "may well smack of sharp practices," no evidence had been submitted to show that Popke's creditors had been defrauded or that any of his creditors even questioned the property transfer.

8. The Board concluded that the record evidence did not demonstrate a lack of candor on Popke's part concerning his stated reasons for listing the real estate as his own. In assessing Popke's claim to beneficial ownership of the land, the Board pointed out that Popke believed that he retained a sufficient ownership interest to list the property as his asset, that his local counsel confirmed that belief, that Popke had the apparent ability to control what happened on the land continuously since 1960, and that title was promptly returned to him at his request. 89 F.C.C. 2d at 807. Finally, the Board ruled that, since the record did not demonstrate that the 1970 property transfer or Popke's motives were improper, the ALJ's "lack of candor" findings concerning Popke's and Benson's refusal to concede improper motives need not be considered and could not result in any comparative demerit against RPI. 89 F.C.C. 2d at 808.

9. On appeal, the Court ruled that the ALJ had not exceeded the permissible bounds of inquiry when he examined Popke's intent and purposes in transferring the property in 1970 and when he questioned Popke's business practices. Further the Court found that such an inquiry by the ALJ demonstrated that between 1970 and 1980 Popke claimed to own the property when it served his business purposes and failed to list the property when that suited his needs. The Court concluded that such behavior "atrikes at the heart of the Commission's interest in candid and honest applicants." The Court also found that the Board's reversal of the ALJ's finding that Mr. Popke lacked candor, on the grounds that his conduct did not amount to common law fraud, was error. In short, the Court held that the question of whether or not Popke had engaged in technical fraud was irrelevant to the question of whether Popke had lacked candor before the Commission and that the Board had not pointed to substantial evidence to counter the ALJ's determination that Popke lacked candor in his explanation of the 1970 transfer.

10. The Court also concluded that the Board erred when it overruled the ALJ's determination that Popke misled the Commission by claiming he owned property to which he had no legal title. In this regard, the Court ruled that the Board could not excuse Popke's action on the grounds that he relied on the advice of counsel, since RPI was ultimately responsible for Popke's action and the counsel in question was also an officer of RPI. The Court cited, *inter alia, WEBR, Inc. v. FCC*, 420 F.2d 158, 167-68 (D.C. Cir. 1969), for the latter conclusion. Lastly, the Court found that Popke's claim that he owned property to which he had no legal title was a material misstatement, not a minor one as the Board ruled, since it involved a matter of possible decisional significance. Thus, the Court ruled that the Board's complete exoneration of Mr. Popke was arbitrary, capricious and inconsistent with both judicial and agency precent.

11. Further, the Court did not merely point out errors of law committed by the Board and remand the case to the Commission to resolve the factual issue of whether misrepresentation and/or lack of candor on RPI's part had occurred. The Court found that RPI made misrepresentations and/or exhibited a lack of candor and has remanded the case for a determination by the Commission of an appropriate sanction to be imposed against RPI. The Commission filed a Petition for Rehearing in Part or for Clarification, which requested the Court to allow the FCC the usual discretion which an administative agency is given to make ultimate factual determinations once errors of law have been set forth, citing, *inter alia, FPC v. Idaho Power Co.*,344 U.S. 17, 20 (1952). The Court denied the Commission's petition without writing an opinion.

12. Air-Borne and Sear argue that RPI should be disqualified or assessed a substantial and dispositive demerit for Popke's misconduct. RPI responds that, at most, it should receive a very slight comparative demerit and that it should still be the preferred applicant, based upon its superior qualitative enhancements. RPI asserts that any demerit assessed against it for Popke's conduct should be very slight, because Popke's explanation of the 1970 title transfer merely reflected Popke's subjective intentions in dealing with his creditors and therefore has dubious value in predicting whether RPI will be a responsible licensee. RPI also argues that it should be the preferred applicant in light of the new guidelines articulated in the Commission's recently adopted *Character Policy Statement, supra.* Pursuant to the *Character Policy Statement*, the Commission no longer assesses character demerits in comparative broadcast proceedings, although an applicant can be disqualified if the record evidence demonstrates that the applicant lacks the basic character qualifications to be a Commission licensee.

13. RPI further contends that, if the Commission cannot grant its application based upon the existing record, the case should be remanded to determine whether Popke lacked candor in explaining his purpose in transferring title to his sisters. [7] RPI claims that the ALJ disbelieved Popke's explanation on the basis of the ALJ's own view of relevant business practices. Finally, RPI asserts that, if it had notice before issuance of the Initial Decision that the ALJ would not believe Popke, RPI could have presented expert witnesses, as well as creditors and businessmen with whom Popke had dealt, to support Popke's explanation of his conduct in 1974.

14. After having examined the applicants' pleadings and the record evidence, we have determined that RPI must be assessed a dispositive comparative demerit for what the Court of Appeals characterized as Popke's "lack of candor and material representations in connection with RPI's application." In this regard, it would not be appropriate to apply the guidelines set forth in our recently announced *Character Policy Statement, supra.* In this case the Court, rather than directing the taking of further evidence, remanded solely for a determination of the consequences to be attached to Popke's course of conduct. Thus, by the specific terus of the Court's decision, we are here required to impose at least some sanction impacting on the outcome of this case. We originally decided this case over two years ago at a time when different legal principles governed our proceedings and the case is only pending here now because the Court of Appeals remanded it to correct what the Court perceived as errors in applying those principles. In brief, our ""old' character decisions preceding the *Character Policy Statement,* which required the assessment of character demerits in certain situations, are applicable in this unique situation.

15. Further, a remand as suggested by RPI would not be an appropriate course of action in this proceeding. Aithough RPI seeks another chance to establish Popke's version of why he transferred title to his property to his sisters in 1970, RPI had sufficient notice that Popke's conduct and motives were under scrutiny at the hearing and a remand is not warranted to allow RPI to make a further showing that it had a full opportunity to present previously.

16. As stated above, we have concluded that RPI must receive a dispositive character demerit. Given the stance of this remand proceeding, where the Court has already made definitive findings concerning Popke's lack of candor and material misrepresentations in connection with RPI's application (see paragraphs 9 and 10, *supra),* we discern no choice but to select Air-Borne once we factor in a comparative demerit against RPI. [8] Thus, for the reasons set forth below, Air-Borne must be deemed the preferred applicant. Aithough the Court faulted the Commission for not imposing an appropriate sanction against RPI for Mr. Popke's misconduct, it upheld the Review Board's decision on all other matters. The Board awarded Air-Borne and RPI moderate integration preferences over Sear because Sear received only 66 2/3 percent integration credit for integrating two of its three partners. The Board's decision found RPI and Air-Borne to be very close competitors, because they are both 100 percent integrated and they are equal under the diversification criterion. The Board preferred RPI over Air-Borne based upon RPI's superior qualitative enhancements of its integration proposal; *i.e.,* RPI received greater credit for area residence and broadcast experience than Air-Borne, although both applicants received some credit in those areas, and Air-Borne received slight merits for minority group integration (14.29 percent) and female integration (7.15 percent). Because Popke is to be integrated, RPI's qualitative integration must be diminished. *See Gainesville Media, Inc.,* 72 FCC 2d 795, 796-97 (1979), and *Radio Station WABZ, Inc.,* 90 FCC 2d 818, 833 (1982), *aff'd sub nom. Victor Broadcasting, Inc. v. FCC,* 722 F.2d 756 (1983). In light of this circumstance, we are convinced that the above described character demerit assessed against RPI tips the scale in Air-Borne's favor, [9] that Air-Borne's comparative qualifications are superior to those of the other Portage applicants and that its application should be preferred on the basis of the record now before us.

17. ACCORDINGLY, IT IS ORDERED That: (a) the Petition to Expedite Court Ordered Remand Proceedings filed February 13, 1986, by The Air-Borne Group, Ltd. IS DISMISSED as moot; (b) the Petition for Leave to File Rejoinder filed March 28, 1986, by The Air-Borne Group, Ltd. IS GRANTED; (c) The decision herein [10] IS MODTFIED as reflected above; (d) the application of The Air-Borne Group, Ltd. (File No. BPH 10,239) for authority to construct a new FM broadcast station at Portage, Michigan IS GRANTED; and (e) the applications of WHW Enterprises, Inc. (File No. BPH-9878), Radio Portage, Inc. (File No. 10,211), and Sear Broadcasting Company (File No. BPH-10,241) for FM construction permits ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

FOOTNOTES

[1] *Enterprises, Inc.,* 89 F.C.C. 2d 799 (Rev. Bd. 1982); *review denied,* FCC 83-368, released September 15, 1983

[2] *WHW Enterprises Inc. et al. v. FCC,* 753 F.2d 1132 (D.C. Cir. 1985).

[3] FCC 851-85, released June 27, 1985.

[4] We shall dismiss this petition as moot insofar as the petition seeks expedited action; since we have acted on this matter as expeditiously aa possible, consistent with the orderly disposition of the Commission's business. Insofar as this pleading discusses the applicability of our *Policy Regarding Character Qualifications in Broadcast Licensing (Character Policy Statement)* 102 F.C.C. 2d 1179 (1986), those arguments have been considered. As explained below, we have determined that the guidelines contained in the *Character Policy Statement* are not applicable to this proceeding.

[5] In this regard, RPI's Rejoinder explains that this processing did not include an issue to determine whether Mr. Popke's past broadcast record was unusually good or unusually poor. The Adinistrative Law Judge rejected Air Borne's attempt to make a threshold showing that Popke's stewardship of Station WYYY(AM), Kalamazoo, Michigan, was unusually poor and held that there was no justification for a full evidentiary inquiry into Popke's past broadcast record under the comparative issue. *See* FCC 78M-841, released May 25, 1978. RPI did not except to this ruling. Thus, apart from the evidence admitted under the past broadcast experience criterion, RPI is precluded from now arguing about the nature of Popke's past broadcast record. *See* Section 1.277(a) of the Rules and our *Policy Statement on Comparative Broadcast Hearings,* 1 F.C.C. 2d 393, 398 (1965). Neverneless, RPI's Petition for Leave to File will be granted so that the record will fully reflect the parties' arguments.

[6] The Court rejected the applicants' arguments addressed to other issues as being plainly without merit. Nevertheless, some of the applicants continue to make these arguments in their current pleadings concerning what further action would be appropriate pursuant to the Court's remand, as well as arguing new matters which were not previously raised with the Court. As to the matters already considered by the Court, the Court's

determinations are final. See Section 402(h) of the Communications Act, as amended, 47 U.S.C. 402(h). As to the new matters, litigants must raise their claims on their initial appeal and not in subsequent proceedings following a remand. *See Eli Lilly and Compaines v. Home Life Insurance,* Case No. 84-5391 (D.C. Cir. June 24, 1986), citing *Laffey v. Northwest Airlines, Inc.,* 740 F.2d1071, 1089-1092 (D.C. Cir. 1984). Thus, this Memorandum Opinion and Order does not address any of these arguments.

[7] RPI also argues that, if the Commission cannot grant its application, the case should be remanded to determine whether Air-Borne's eight integrated owners are still committed to work full-time at the station. This latter point clearly does not warrant a remand, since RPI has not made any new allegation raising a question of fact and RPI has not submitted any specific data indicating that Air-Borne's principals are no longer committed to work full-time at Air-Borne's proposed station. *See, e.g., The News-Sun Broadcasting Co.* 27 F.C.C. 2d 61, 62 (1971)

[8] Although the parties argue as to whether a moderate, substantial or other level of demerit should be assessed, there is no need to attempt a precise quantitative description for the derelictions involved here, since any meaningful demerit would ultimately render RPI's application clearly inferior on a comparative basis.

[9] We note that questions concerning the constitutionality of preferences based on minority and female ownership have been raised in conjunction with *Steele v. FCC,* No. 84-1176 (D.C. Cir.). However, there is no need to delay resolution of this case. Air-Borne would win based on the demerit assessed against RPI even if it received no credit for the integration of its minority and female ownership.

[10] WHW Enterprises Inc. 89 F.C.C. 2d 799 (Rev. Bd. 1982); review denied, FCC 83-368, released September 15, 1983.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM DOCKET NO. 85-164

ELKTON
BROADCASTERS, INC. File No. BPH-840402IA
Elkton, Virginia

Ernest P. Evans, et al., d/b/a File No. BPH- 840607IA
STONEWALL
BROADCASTING COMPANY
Elkton, Virginia

For Construction Permit
for a New FM Station

Appearance

Stanley B. Cohen and *Robert B. Jacobi* on behalf of Elkton Broadcasters, Inc.; *Forbes W. Blair* and *William D. Silva* on behalf of *Ernest P. Evans, et al.,* d/b/a Stonewall Broadcasting Company;, and *Norman Goldstein* on behalf of Chief, Mass Media Bureau, Federal Communications; Commssion

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH P. GONZALEZ

Issued: October 21,1986; Released: November 4, 1986

PRELIMINARY STATEMENT

1. The applications of Elkton Broadcasters, Inc. and Ernest P. Evans, *et al.,* d/b/a Stonewall Broadcasting Company for a new FM broadcast facility in Elkton, Virginia were designated for hearing by (Hearing Designation Order), Mimeo No. MM 5463, released in this proceeding on July 3, 1985. The only issues specified were the following standard comparative issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.
2. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

However, at paragraph thirteen (13) of the aforementioned (*Hearing Designation Order),* the Commission required that the areas and populations which receive FM service of 1 mV/m or greater intensity, together with the availability of other primary rural services in such areas. be considered under the standard comparative issue.

2. A prehearing conference was held on September 12, 1985 and the hearing on January 28, 1986. The record was closed on January 28, 1986 and Proposed Findings of Fact and Conclusions of Law were filed by both applicants and by the Mass Media Bureau of this Commission on March 3, 1986 and separate reply statement, were filed by both applicants on March 24, 1986

PROPOSED FINDINGS OF FACT

3. Elkton Broadcasters, Inc. (Elkton) is a Virginia corporation with three stockholders. Pamela Joan Davis, Elkton's President and a Director, holds 55 percent of the stock; her brother, Fred W. Greaves, Jr., is Vice President and Director with 40 percent of the stock; and Fred W. Greaves. Sr. holds the remaining 5 percent of the stock, and is also a Director in addition to being Secretary of the corporation (Elkton Ex. 1).

Diversification

4. Neither Elkton nor any of its shareholders has any ownership interest in any medium of mass communications (Elkton Ex. 3).

Integration

5. Elkton's proposal calls, for the integration of Mrs. Davis into the affairs of the station on a full-time basis, or 40 hours a week, as General Manager, and of Mr. Greaves, Jr., as Operations and Technical Director, on a part-time basis or at least 20 hours a week (Elkton Ex. 2).

6. Mrs. Davis lived in Elkton from November 1950 to April 1953 and from November 1969 to the current date. She bas been a member of the Elkton Historical Society from 1983 to the present, and was also an active member of a local house of worship from 1969 to 1983. Mrs. Davis is currently employed on a full-time basis in a business owned by her husband. In the event that Elkton receives the permit, Mrs. Davis will terminate all of her responsibilities with her husband's business except for bookkeeping functions which she estimates will require approximately 10 to 15 hours a week of her time (Elkton Ex. 2; Tr. 31).

7. Mr. Greaves, Jr.'s duties at the proposed station will include a weekly review of the station's sales and its programming, promotions, billings and collections, as well as regular consultations with the station's General Manager. In addition, he will be responsible for contacting civic and business leaders in the community for the purpose of ascertaining proper subject matters for the public affairs programming of the proposed station and for arranging for the participation of such persons as guests on the station's public affairs and public oriented programming. Mr. Greaves will also be responsible for maintaining the station's technical facilities (Elkton Ex. 2).

8. Mr. Greaves currently lives on a full-time basis in Dover, Pennsylvania. In the event that Elkton receives the permit, Mr. Greaves proposes to reside in Elkton only on the weekends. and continue to live in Dover for the balance of the week. He estimates the driving time between Dover, Pennsylvania and Elkton, Virginia to be approximately 3 1/2 hours, (Tr. 23, 44-45). Mr. Greaves was, a full-time resident of Elkton between November 1950 and October 1955 (Elkton Ex. 2).

9. Mr. Greaves is currently employed by Susquehanna Broadcasting Company (Susquehanna), which either directly or through its subsidiaries, is the licensee of a number of broadcast facilities located in Pennsylvania, Indiana, Ohio, Florida, Texas, California and Virginia. Mr. Greaves has no ownership interest in Susquehanna. For the past 10 years, Mr Greaves has held the position of Assistant Director of Engineering (Elkton Ex. 2).

10. Elkton claims a 55 percent full-time integration credit for Mrs. Davis and a 40 percent part-time integration credit for Mr. Greaves, Jr. In addition, it argues that it is entitled to a qualitative enhancement of Mrs. Davis'

integration credit for her past and present local residence in the Elkton, Virginia area with some civic involvement and of Mr. Greaves, Jr.'s credit for his past broadcast experience and his commitment to reside in Elkton, Virginia on a part-time basis (Elkton's Proposed Findings, pp. 16-17).

Auxiliary Power

11. Elkton proposes to utilize auxiliary power (Elkton Ex. 5).

Stonewall Broadcasting Company

12. Stonewall Broadcasting Company (Stonewall) is a general partnership registered in the Commonwealth of Virginia. Stonewall has three partners: Ernest P. Evans, Victoria Wakefield and Brenda Mae Merica (Stonewall Ex. 1).

Diversification

13. None of the partners in Stonewall has any ownership interest in any medium of mass communications (Stonewall Ex. 1).

Integration

14. Ernest P. Evans will serve as Program/News Director of the proposed broadcast facility, devoting a minimum of 40 hours a week to his duties at the station. Mr. Evans proposes to live full time in Elkton, Virginia (Stonewall Ex. 2, p. 2). Brenda Mae Merica will devote a minimum of 40 hours weekly on a regular basis to her duties as Sales Manager at the proposed facility (Stonewall Ex. 3, p. 2). Ms. Merica, who presently resides in the Elkton area, will continue to make her home there (Stonewall Ex. 3, p. 2). Stonewall's third and last partner, Victoria Wakefield, will serve as the proposed station's General Manager, devoting at least 40 hours a week to her duties as General Manager (Stonewall Ex. 4, p. 2). In the event that Stonewall's application is granted, Ms. Wakefield proposes to move to Elkton, Virginia (Stonewall Ex. 4, p. 2).

15. Mr. Evans has maintained a residence near Elkton, approximateiy 7 miles from the corporate town since 1970. He was a full-time resident in Elkton from March 1974 until July 1975, a part-time resident of the Elkton area from July 1975 until September 1979, and from 1979 to 1985 spent 1/3 of his time in the Elkton-Harrisonburg area, with approxi mately 50 percent of this time at his Elkton residence (Stonewall Ex. 2, p. 1).

16. Mr. Evans was a candidate in 1974 for the United States Congress from the Seventh Congressional District in Virginia which includes Elkton (Stonewall Ex. 2, p. 1), and he has been a member of the Page County Democratic Committee since 1972 to the present as well as a member of a number of past Elkton area political organizations.[1] In addition, since 1970 Mr. Evans has been a member of the Naked Creek Baptist Church located near Elkton and has participated in a number of church activities. He was also involved in fund raising for the American Cancer Society in the Elkton area during 1976, 1978-1983 and 1985, and has been a patron and trail blazer for the Potomac Appalachian Trail Club in Elkton from 1980 to the present (Stonewall Ex. 2, p. 2).

17. While a student in college, Mr. Evans worked as a part-time announcer in 1962-1963 for station WIVY in Jacksonville, Florida, and in 1964 and 1965 served as producer and moderator of the weekly television program entitled The Jacksonville Youth Forum on station WJXT-TV, Jacksonville, Florida (Stonewall Ex. 2, p. 2).

18. Mrs. Merica has resided in the Elkton area her entire life and currently lives 5 miles outside of the corporate limits of Elkton. She is a lifelong member of the Naked Creek Baptist Church, and has served as secretary, teacher and bookkeeper for one of the church's building projects. From 1976 to the present, she has been a volunteer for the American Cancer Society. She has also served as Secretary of the Page County Advisory Committee of Virginia Polytechnical Institute, and from 1980 to 1983, Ms. Merica was Secretary-Treasurer of the District 5, Democratic Party. In addition, she has been a member of the Page County Democratic Women's Club from 1975 to the present, and is a member and currently an alternate to the Page County Democratic Committee. She has also served in the past as a delegate to several State conventions and has raised funds, handled press relations, trained volunteers and coordinated events for political organizations in Page County (Stonewall Ex. 3, p. 1).

19. Stonewall claims a 100 percent integration credit on the basis of its proposal to integrate all of its partners into management level positions. It claims that Mr. Evans' integration proposal is enhanced by past and present local residence with civic involvement, future full-time local residence and some broadcast experience, and Ms. Merica's by her lifelong residency in the Elkton area, her active involvement in local civic activities, and some past broadcast experience. It claims an enhancement of Ms. Wakefield's integration credit for her decision to move to Elkton in the event that Elkton's application is granted and for her past broadcast experience (Stonewall's Proposed Findings, pp. 14-16).

20. Stonewall's claim that Ms. Merica and Ms. Wakefield have past broadcast experience is based on Ms. Merica's spot announcements, news reports as well as interviews which she gave on local radio stations, and Ms. Wakefield's assistance, performed as part of her duties for her employer, United Press International, to radio stations in Virginia and Maryland in tailoring news reports to their respective audiences (Stonewall Ex. 3, p. 2; Stonewall Ex. 4, p. 1).

Auxiliary Power

21. Stonewall will utilize an auxiliary power source in order to insure continued operation during periods of power failure (Stonewall Ex. 5).

Comparative Coverage

22. Stonewall will serve within its 60 dBu contour 54,821 persons in 622.4 square miles. Elkton will serve 36,910 persons within 665.8 square miles (Joint Ex. 1, p. 10).

23. Areas and populations within differential areas receiving five or fewer daytime aural services are as follows:

	3 or Less		4		5 or Less	
Applicant	Population	Area	Population	Area	Population	Area
Elkton	37	1.3	456	15.3	6,959	81.9
Stonewall	-	-	-	-	25,363	55.1

The nighttime figures are as follows:

Applicant	Elkton	Stonewall
Gray Area		
Pop.	37	-
Area	1.3	-
2 Serv.		
Pop.	1191	347
Area	31.9	6.7
3 Serv.		
Pop.	897	22971
Area	27.8	14.6
4 Serv.		
Pop.	5304	1035
Area	36.9	15.6
5 Serv.		
Pop.	23	1010
Area	.6	18.2

(Joint Ex. 1, pp. 11-12.)

24. The above figures demonstrate that during the day Elkton will provide a fourth service to an area of 1.3 square miles with a population of 37 and a fifth service to an area of 15.3 square miles with a population of 456. Stonewall will not provide a daytime service to any area or population having fewer than five services.

25. During nighttime operations, Elkton will provide a second service to an area of 1.3 square miles with a population of 37; a third service to an area of 31.9 square miles with a population of 1191; a fourth service to an area of 27.8 square miles with a population of 897 and a fifth service to an area of 36.9 square miles with a population of 5304. Stonewall will provide a third nighttime service to an area of 6.7 square miles with a population of 347; a fourth nighttime service to an area of 14.6 square miles with a population of 22,971 and a fifth to an area of 15.6 square miles with a population of 1,035 (Joint Ex. p. 12).

CONCLUSIONS OF LAW

Diversification

26. The parties have concluded, and the evidence of record supports the finding that both applicants are on an equal footing with respect to the diversification criterion since neither applicant has any cognizable media interests (Stonewall's Proposed Findings, p. 14, and Elkton's Proposed Findings, p. 15).

Best Practicable Service

Auxiliary Service

27. Both parties propose to install an auxiliary power source which would be available for use in the event of a power failure. Accordingly, this factor is also of no decisional significance when weighing the two proposals.

Integration

Elkton

28. Ms. Davis proposes to serve as the station's full-time General Manager with those duties generally attributed to that position. Although Ms. Davis has no broadcast experience, she will be the only Elkton principal at the station on a day-to-day basis and she will, therefore, be required to make day-to-day management decisions which would entitle her activities at the station to an integration credit. The presiding Judge concludes, therefore, that Ms. Davis' integration commitment is credible, and Elkton will be awarded a 55 percent full-time quantitative integration credit which is qualitatively enhanced by her local residence and her very limited civic activities.

29. Fred Greaves, Jr., Ms. Davis' brother and 40 percent owner of Elkton proposes to work at the station a minimum of 20 hours a week as the station's Technical and Operations Director while remaining employed on a full-time basis at a location 3 1/2 hours driving time from Elkton. It is reasonable to expect that Mr. Greaves who has a significant ownership interest in Elkton, will take an active role in running the station. However, his proposal to work 20 hours a week at the Elkton station on a permanent basis while living 3 1/2 hours driving time from Elkton and working full time for Susquehanna is not credible and it cannot and will not be credited. Although Mr. Greaves may be willing initially to make the effort to fulfill his 27-hour commitment to Elkton, it is highly unlikely that he will be able to sustain such a rigorous schedule over the long term. The conclusion is inescapable, therefore, that Mr. Greaves' part-time integration commitment to Elkton is inherently unrealistic and is not sustainable, and that it lacks that degree of permanence which would entitle Elkton to a part-time integration credit for Mr. Greaves. Accordingly, no integration credit will be awarded Elkton for the Greaves integration commitment.

Stonewall

30. All three Stonewall principals propose to be integrated into the affairs of the proposed station on a full-time basis. Although Elkton argues that the degree of ownership of each partner is unclear, because of what it characterizes as conflicting testimony with respect to the initial partnership agreement, all three partners testified that the original agreement was subsequently amended to insure that all three partners would have an equal share in the partnership (Tr. 74, 116-122 and 184), and there is no evidence of record which refutes these claims. Accordingly, Stonewall will be awarded a 100 percent full-time quantitative integration credit for its proposal to integrate all three of its partners on a full-time basis into the affairs of the proposed station.

31. Elkton questions Stonewall's candor and forthrightness with respect to the extent of Mr. Evans' residence in the Elkton area and his past broadcast experience, arguing that Stonewall deliberately overstated both factors in an attempt to gain a comparative advantage. It submits that Elkton's lack of candor draws into question the credibility of Mr. Evans' integration commitment. It notes, for example, that Mr. Evans' claim that he spent 50 percent of his time between 1975 and 1979 in the Elkton area is not compatible with the fact that he held two consecutive full-time positions with the federal government in Washington, D.C. during that period of time, maintained a home in Washington, D.C. and held a Washington D.C.

driver's permit; and that his claim that he spent 1/3 of his time in the Elkton/Harrisonburg area between 1979 and 1985 is similarly suspect since at that time he was self-employed in the Washington, D.C. area, still held his D.C. driver's permit and continued to maintain a residence in Washington, D.C. As to Mr. Evans' past broadcast experience, Elkton argues that Stonewall, by not specifying in its direct testimony that Mr. Evans' employment at the Jacksonville, Florida station was only part-time, sought to mislead the Commission into believing that he was a full-time employee.

32. It is clear that Mr. Evans has had significant contacts with both Washington, D.C. and the Elkton area during these periods of time. For example, Mr. Evans, who ran in 1974 for the United States Congress from Virginia's Seventh District which includes Elkton, still votes in Virginia, and he continues to maintain a home in the Elkton area. Mr. Evans is also an active member of the Naked Creek Baptist Church, and has participated to a limited degree in other civic activities in the area during these periods of time. Although he held two consecutive positions with the federal government during his period of part-time residence between 1975 and 1979, Mr. Evans testified that he traveled outside of Washington, D.C. a great deal of the time on business and spent 50 percent of his non-travel time in the Elkton area. The claim is not inherently unbelievable and there are no facts of record to dispute that claim or his further claim that since he has become self-employed in Washington, D.C., he has spent 1/3 of his time in the Elkton/Harrisonburg, Virginia area. The Presiding Judge concludes, therefore, that there has been no showing that Mr. Evans deliberately sought to mislead the Commission as to the amount of time that he has spent in the Elkton area, or that Mr. Evans deliberately sought to mislead the Commission as to the nature or extent of his employment at the station in Jacksonville, Florida.

Comparative Coverage

33. With respect to the comparative coverage factor, the Presiding Judge finds that both applicants are at virtually a standoff. Elkton's proposal which will provide a night-time service to a gray area and daytime service to under-served areas is found to be comparatively superior to a very slight degree to Stonewall's which has an overall coverage advantage.

ULTIMATE CONCLUSIONS

34. Stonewall is entitled to a 100 percent quantitative full-time integration credit as compared to Elkton's 55 percent full-time credit. Stonewall therefore is entitled to a substantial preference over Elkton under the integration criterion. In view of the substantial integration preference for Stonewall, it is unnecessary to determine whether Stonewall's or Elkton's integration commitments are entitled to any qualitative enhancements.

35. As noted above, both applicants stand on an equal footing with respect to the diversification criterion and their auxiliary power proposals. Elkton, however, is entitled to a very slight comparative coverage preference.

36. Considering all comparative factors, the Presiding Judge finds that Stonewall's proposal which as noted above has been awarded a substantial integration preference over Elkton, is comparatively superior to Elkton's proposal which is entitled to only a very slight coverage preference. Accordingly, he concludes that Stonewall's proposal will best serve the public interest and it will be awarded the permit for the new FM station at Elkton, Virginia.

RULING

37. IT IS ORDERED that unless an appeal from this Initial Decision is taken by a party, or the Commission reviews this Initial Decision on its own motion in accordance with the provisions of Section 1.276 of the Commission's Rules, 47 C.F.R. 1.276, the application of Ernest P. Evans, *et. al.*, d/b/a Stonewall Broadcasting Company (MM Docket No. 85-164, File No. BPH-840607IA) for a construction permit for a new FM broadcast station to operate on Channel 252A at Elkton, Virginia IS GRANTED, and the application of Elkton Broadcasters, Inc. (MM Docket No. 85-164, File No. BPCT-840402IA) IS DENIED.[2]

FEDERAL COMMUNICATIONS COMMISSION

Joseph P. Gonzalez
Administrative Law Judge
Federal Communications Commission

[1] Page County Chairman - Aldhizer for Senate (1975); Volunteer - Page County Carter for President (1976); Page County Miller for Governor, Robb for Lt. Governor organization (1977); Page County Miller for Senate campaign (1978); Page County Robb for Governor campaign (1981); Page County Dorrier for Congress campaign (1982); Chairman - 7th District Hart for President (1984); and Chairman - Page County Davis for Governor campaign (1985). (Stonewall Ex. 2, p. 1.)

[2] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

In Re Applications of

SUSQUEHANNA CELLULAR COMMUNICATIONS LIMITED PARTNERSHIP — File No. 28117-CL-L-86

File No. 28118-CL-L-86

For licenses to cover Construction Permits to operate on frequency Block B in the Domestic Public Radio Telecommunications Service to serve the York, Pennsylania Metropolitan Statistical Area and to serve the Lancaster, Pennsylvania Metropolitan Statistical Area

MEMORANDUM OPINION AND ORDER

Adopted October 20, 1986; Released October 29, 1986

By the Common Carrier Bureau:

1. Susquehanna Cellular Communications Limited Partnership ("Susquehanna LP") has filed applications for radio station licenses to cover construction permits to operate on frequency block B in the Domestic Public Cellular Radio Telecommunications Service in the York and Lancaster, Pennsylvania Metropolitan Statistical Areas ("MSAs").[1] York Cellular Settlement Partnership ("York Cellular") and Harrisburg Cellular Telephone Company ("Harrisburg Cellular") each filed a petition to defer the grant of operating authority in each of these respective markets.[2] Responsive pleadings have been filed. After review of the applications and related pleadings, we conclude for reasons stated below that a grant of Susquehanna LP's applications will best serve the public interest.

Lancaster

2. Harrisburg Cellular as a would-be reseller contends that the prices its customers are charged for roaming are higher than those charged Susquehanna LP's own customers. It attributes the existence of this discrimination to the wireline headstart, which allegedly permitted United Telespectrum, Inc. ("United") to acquire control of the wireline carriers in the Lancaster, Harrisburg, and York MSAs. This would allow operation of them as a single system, contends Harrisburg Cellular, and permit Susquehnna LP's customers to roam among the three MSAs without paying roamer access charges. It also contends that certain other terms of the proposed resale agreement (such as prior submission to Susquehanna LP of all papers that the reseller intends to submit to governmental agencies) are discriminatorily burdensome. In addition, Harrisburg Cellular claims that the cost of resale is "too high to permit a reseller to engage in profitable operation," that the roamer and resale rates are not cost-justified, and that this is violative of Section 202(a) of the Communications Act of 1934, as amended. It requests that the Commission either defer the grant of Susquehanna LP's license or direct the wireline licensees in Harrisburg, Lancaster, and York to formulate cost-based roamer access and usage charges.

3. Susquehanna LP responds that Harrisburg Cellular lacks standing to file a petition to defer in Lancaster because it is not a non-wireline applicant there. Susquehanna LP argues that because Harrisburg Cellular does not offer any evidence to validate its contention that resale in Lancaster is essential to the viability of its Harrisburg system, Harrisburg Cellular's petition is deficient. Susquehanna LP contends that it has offered the same rates, terms, and conditions to all prospective resellers in Lancaster.[3] It argues that the Commission has never guaranteed that resellers would realize a profit, and that lack of a profit has no relevance to the headstart policy. Susquehanna LP explains that subscribers of foreign carriers (such as Harrisburg Cellular) all pay the same set of roaming fees, albeit higher than those charged Susquehanha LP's own subscribers. It asserts that this is permissible.

4. We reject Harrisburg Cellular's arguments. The Commission has concluded that the public interest would best be served by initiating service as soon as possible. *Cellular Communications Systems*, 86 FCC 2d 469, 491 n. 57 (1981), *modified on reconsideration*, 89 FCC 2d 58, 72, 74-5 (1982). The Commission made one limited exception to this doctrine, however:

> If . . . a *non - wireline* applicant can demonstrate that permitting an early entry into the market would not be in the public interest, we would consider a request for a brief moratorium on wireline cellular service. We should emphasize, however, that general unsupported allegations of harm will not be sufficient to delay service to the public. [citations omitted and emphasis supplied]

89 FCC 2d at 491, n. 57. The Commission also stated that "any party requesting such a moratorium bears a heavy burden of demonstrating that such action would be in the public interest." 89 FCC 2d at 75, n. 32. That burden must be sustained by "specific and compelling evidence that early wireline entry will foreclose development of a competitive market." 89 FCC 2d at 75, *Cincinnati SMSA Limited Partnership*, FCC Mimeo No. 640, released November 5, 1984 at para. 11.

5. We find that Harrisburg Cellular is not the proper party to submit a petition to defer operation in the Lancaster MSA. The headstart doctrine is intended to permit the non-wireline applicant to show that competition with the wireline licensee in Lancaster would be irreparably harmed by the wireline's provision of service earlier than the non-wireline applicant. Harrisburg Cellular is neither the non-wireline tentative selectee nor an applicant for Lancaster. In any event, its allegations fail to demonstrate any basis upon which the grant of Susquehanna LP's license should be deferred.

6. Similarly, with respect to Harrisburg Cellular's allegations that Susquehanna LP's proposed resale agreement including rates are discriminatory, this proceeding is not the appropriate vehicle to make such charges. The Commission adopted resale as a safeguard to promote competition between the wireline and non-wireline operators authorized to serve a given market, and in doing so prohibited restrictions on resale and required that the wireline licensee to "provide system capacity to

non-affiliated retailers or resellers on a non-discriminatory basis and on the same terms and conditions as [to] its own distribution arm." *Cellular Communications Systems*, 86 FCC 2d at 510-11. In this case, Harrisburg Cellular is neither the non-wireline tentative selectee nor an applicant for Lancaster. Therefore, to the extent that Harrisburg Cellular as a reseller deems that the rates, terms, and conditions of the resale agreement proposed by Susquehanna LP violate these standards, it may submit a formal complaint with the Commission requesting relief under Section 208 of the Communications Act of 1934, as amended, and Section 1.721 *et seq.* of the Commission's Rules.[4]

York

7. We reject York Cellular's petition to defer. Its petition relies solely on what it has allegedly learned about the negotiations between Susquehanna LP and Harrisburg Cellular on resale in the Lancaster MSA. Furthermore, because York Cellular apparently has not engaged in any discussions with Susquehanna LP concerning a resale agreement, including provisions for roaming, it clearly has no basis for its request to delay the granting of Susquehanna's operating license in York. Therefore, we will deny York Cellular's petition.[5]

Conclusion

8. We find that Susquehanna LP is legally and technically qualified to hold a license to provide cellular service to the public in the Lancaster and York MSAs. Our decision turns on the clear and significant benefit to the public that we envision from the rapid introduction of this new service.[6] We therefore conclude that the public should be afforded the opportunity to use this cellular service without additional delay.[7]

9. Accordingly, IT IS ORDERED That the applications of Susquehanna Cellular Communications Limited Partnership for covering licenses for the York Metropolitan Statistical Area, File No. 28117-CL-L-86, and for the Lancaster Metropolitan Statistical Area, File No. 28118-CL-L-86, ARE GRANTED.

10. IT IS FURTHER ORDERED that the petitions to defer filed by York Cellular Settlement Partnership and by Harrisburg Cellular Telephone Company ARE DENIED.

11. This order is issued under Section 0.291 of the Commission's rules and is effective on its adoption date. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order. *See* Section 1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

Kevin J. Kelley
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] Susquehanna LP is a partnership owned and controlled by United Telespectrum, Inc., which holds a 48.4% interest in Susquehanna LP as a general partner and a 20% interest as a limited partner.

[2] Harrisburg Cellular is the non-wireline licensee for the Harrisburg MSA, and competes with Susquehanna LP, which also is the wireline licensee in Harrisburg. Neither Harrisburg Cellular nor any of its partners, however, is the non-wireline tentative selectee for the Lancaster MSA. It intends to become a reseller in Lancaster of the cellular services of Susquehanna LP. The Lancaster non-wirline tentative selectee is Lancaster Cellular Telephone Company, which has not filed any pleading in this matter. For the York MSA, the non-wireline tentative selectee is York Cellular, which wishes to become a reseller of Susquehanna LP's services in York.

[3] Susquehanna LP notes that its proposed resale agreement states that several of its provisions, including prior submission of pleadings to governmental agencies and others, could be waived for Harrisburg Cellular and other resellers that object. Susquehanna LP also notes, as confirmed by Harrisburg Cellular, that both parties were conducting negotiations as to the provisions of final agreement prior to the filing of the subject petitions to defer.

[4] We, however, encourage the parties to resume their apparently promising discussions in order that they might quickly reach agreement on the rates and conditions of resale, including roamer rates.

[5] Parties are reminded that the filing of insubstantial pleadings, bereft of any factual or legal basis, borders on abuse of process.

[6] *See Rogers Radio Communications ,Inc .v .FCC* , 593 F.2d 1225 (D.C. Cir. 1974).

[7] As the court said in *MCI Telephone C o . v . F C C , "it is high time to move cellular telephone services from the FCC's regulatory process to the marketplace." 738 F.2d 1322, 1328 (D.C. Cir. 1984).*

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

UNITED TELESPECTRUM, INC. File No. 23275-CD-P/L-1-85

For an additional one-way location on frequency 152.84 MHz in the Public Land Mobile Radio Service at Paradise, Florida

B&B COMMUNICATIONS, INC. File No. 23006-CD-P/L-1-85

For a new one-way paging channel on frequency 152.84 MHz in the Public Land Mobile Radio Service at Gainesville, Florida

WESTSIDE COMMUNICATIONS OF TAMPA, INC. File No. 21972-CD-P/L-1-85

For a new one-way paging channel on frequency 152.84 MHz in the Public Land Mobile Radio Service at High Springs, Florida

MEMORANDUM OPINION AND ORDER

Adopted October 21, 1986; Released October 29, 1986

By the Common Carrier Bureau:

1. On September 24, 1985 United Telespectrum (United) submitted a letter requesting that the referenced applications be designated for comparative hearing pursuant to Section 22.33(c) of the Commission's Rules. The applications were announced as mutually exclusive by reason of potential electrical interference in *Public Notice*, Report No. PMS-85-32, released August 28, 1985. United contends that its request meets the criteria of Section 22.33(c) because the location of the proposed facility is less than 40 miles from its existing authorized station which operates on the same frequency of 152.84 MHz at Ocala, Florida and the proposal is in the public interest because the same paging services will be available to subscribers in the Paradise/Gainesville, Florida area that are available to its subscribers in other cities which make up its wide area Florida paging network. United also asserts that lottery selection of another applicant could result in a denial of these services not only to prospective subscribers in Paradise but also to its existing subscribers who want paging service in the proposed service area.

2. One of the other two applicants for the same frequency, Westside Communications of Tampa, Inc., has filed an amendment to its application to change the frequency. The second, B&B Communications, Inc.(B&B), opposes United's request and contends that the additional requirement in Section 22.33(c) for a demonstration of how the public interest would be served by using a comparative hearing procedure rather than lottery has not been met. B&B alleges that United has not supported its statements of meeting the public interest criteria with documentation, such as a survey, and thus has not provided substantial evidence for the Bureau to designate a hearing on the applications. B&B also asserts that because the 43 dBu contours of United's existing and proposed service areas do not overlap, United has inadequately addressed the need for expanded service by existing subscribers.

3. United replies that it has demonstrated demand of existing subscribers and will submit additional evidence, if needed, at a hearing; and that although it seeks new subscribers, existing subscribers in the Ocala area will use the expanded coverage because of the proximity to the proposed Paradise/Gainesville service area. United also asserts that Section 22.33(c)(1) does not require overlap of the existing 43 dBu service contours by those proposed and that it intends to include the existing and proposed operations with its existing wide area network in Florida.

4. Lottery selection of a licensee among mutually exclusive applicants, as here, is the general rule. Section 22.33(c) provides an exception for an applicant proposing system expansion where it can receive a comparative hearing if the Commission finds it has met the eligibility requirements of Section 22.33(c)(1) of the rules and then demonstrated that some form of comparative procedure would serve the public interest. The exception is strictly construed and enforced. *Mobile Phone of Texas*, Mimeo No. 2728, released February 22, 1985.

5. We find that although United meets the first requirement of Section 22.33(c)(1) with its proposed transmitter just located within 40 miles of the existing location, its showing for the second requirement as to existing subscribers is insufficient. United has not submitted any evidence to demonstrate existing subscriber demand for expanded service. *See Southwestern Bell Telephone Company*, Mimeo No. 4849, released June 3, 1986 *Ram Communications of Michigan ,Inc .*, Mimeo No. 4848, released June 3, 1986. Consequently, we conclude that United has not satisfied the second requirement for eligibility of Section 22.33(c)(1).

6. While 22.33(c) does not specifically require overlap of the existing and proposed service areas, the presence of an area of discontinuous service, approximately six miles at its narrowest distance between the Ocala and proposed Paradise service areas, (United application, Exhibit 1 B), makes United's bare assertions on serving existing customers questionable.

7. Therefore, we deny United's request to designate a comparative hearing. Its application will be included with B&B's in a lottery which will be announced in a public notice.

8. Accordingly, for the foregoing reasons, IT IS HEREBY ORDERED that the request to designate a comparative hearing filed by United Telespectrum, Inc. IS DENIED.

9. IT IS FURTHER ORDERED that a lottery between the captioned applications of United Telespectrum, Inc. and B&B Communications, Inc. shall be held at a time and place to be specified in a subsequent public notice.

10. IT IS FURTHER ORDERED that the request for an amendment filed by Westside Communications, Inc. for its captioned application is GRANTED.

11. This order is issued under Section 0.291 of the Commission's rules and is effective on its release date. Applications for review may be filed pursuant to Section 1.115(e)(3) of the rules. *See* Section 1.4(b)(2).

FEDERAL COMMUNICATIONS COMISSION

Kevin J. Kelley
Chief, Mobile Services Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of

CALIFORNIA SATELLITE SYSTEMS,

Complainant,

v. File No. E-86-106

SACRAMENTO MICROBAND, INC.,

Defendant.

MEMORANDUM OPINION AND ORDER

Adopted October 22, 1986; Released October 30, 1986

By the Common Carrier Bureau:

1. The Bureau has before it a motion for an extension of time filed on October 21, 1986, by defendant, Sacramento Microband, Inc. (SMI), to defer the filing of its answer to the above-captioned complaint until thirty days after a California Superior Court enters a final order in a parallel case between the two parties. *See Sacramento Microband,Inc.v . California Satellite Systems*, Case No. 309223 (Jan. 13, 1983). Complainant, California Satellite Systems (Calsat), filed its opposition to this motion on October 21, 1986. For the reasons stated below, we will deny the request for deferral but will grant SMI its alternative request for a limited one-week extension in which to respond to the complaint.

2. In the California court action, SMI is seeking to recover from Calsat damages arising out of Calsat's failure to pay for Multipoint Distribution Service transmission services provided by SMI. Calsat has denied the essential allegations of SMI's complaint and has advanced numerous affirmative defenses, including violations of the Communications Act by SMI. This case has been pending since 1983 and, until recently, trial was scheduled to commence on September 24, 1986. On the eve of the trial, Calsat filed the instant complaint before this Commission seeking a judgment refunding to it any and all amounts that SMI collects and receives from Calsat in the California proceeding on the ground that SMI violated the of Communications Act. Calsat then moved the California court to delay the trial until after the Commission resolved the Calsat complaint before it on the ground that the Commission was the proper party to untangle the principal issue before the Court, *i. e.*, whether the amounts in controversy are owing under a lawful FCC tariff, and that "judicial economy and substantial justice to the parties will be served by continuing the trial date." The California Court denied Calsat's deferral request but, on other grounds, granted a continuance until January 7, 1987.

3. SMI submits that, under the circumstances, it's answer here should be deferred until after the Court enters a final order. It contends that, in the past, the Commission has acknowledged that where ongoing proceedings in state court might have an impact upon matters raised in complaint proceedings before the Commission, the appropriate course of action is to defer the Commission proceeding. It cites to our order in *Citibank v. Graphic Scanning Corp.*, File No. E-80-25, Mimeo No. 5257 (released June 19, 1986), as support for its request.

4. SMI's motion seeks an indefinite and open-ended extension on the ground that state court proceedings are pending. An unlimited extension of time clearly is not contemplated by Section 1.46 of our Rules, 47 C.F.R. § 1.46. Moreover, that rule specifies that it is Commission policy not to routinely grant such an extension, especially when it is requested less than seven days before the due date. SMI waited until the due date for its answer, October 20, 1986, to notify the staff of its request for an extension. Such action undermines our formal complaint process to provide a meaningful forum for the expeditious resolution of problems between customers and carriers.

5. Moreover, this matter is distinguishable from *Citibank v. Graphic Scanning*. There the pleading cycle was not deferred, but rather the ultimate resolution of the matter after completion of the pleading cycle and partial discovery was deferred pending the state court action. In *Citibank*, the Commission staff was attempting to reach a negotiated settlement between the parties and the success of that goal was dependent upon whether or not the state appellate court reversed a ruling by the trial court. This deferral ultimately led to a complete resolution of the matter in less than six weeks. Here, deferral of the pleading cycle until after the state court acts, a date which at present is unknown, would not serve the ends of justice.

6. It appears from the pleadings that ultimately this Commission may have to render a judgment on the Communications Act claims, either on a referral from the state court or directly on the matters raised by Calsat in the complaint. Therefore, delay in the completion of the pleading cycle would not be in the public interest.

7. Inasmuch as the answer is currently due, we will grant SMI an extension of one week to enable it to respond to the matters raised in the complaint.

8. Accordingly, IT IS ORDERED, pursuant to authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the request of Sacramento Microband, Inc., for an indefinite deferral of its answer in this proceeding IS DENIED.

9. IT IS FURTHER ORDERED that Sacramento Microband, Inc. IS GRANTED an extension until October 29, 1986, to file its answer.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

HOME BOX OFFICE INTERNATIONAL TELEPORT

Application for authority pursuant to Section 214 of the Communications Act of 1934 to establish channels of communication between international earth stations in the U.S. and INTELSAT Atlantic Ocean region satellites for provision of INTELSAT Business Service and international television service	File No. I-T-C-86-100
Application for authority to modify the license for the Hauppauge, New York earth station for provision of INTELSAT Business Services and International Television Service and to add a Co-license	File No. 1193-DSE-ML-86

MEMORANDUM OPINION, ORDER AND CERTIFICATE

Adopted: October 22, 1986 **Released: October 30, 1986**

By the Common Carrier Bureau:

1. The Commission has under consideration the captioned applications, filed on May 14, 1986 by Home Box Office International Teleport (HBOIT), requesting blanket authority to establish channels of communication between U.S. earth stations and INTELSAT Atlantic Ocean region satellites for provision of full time and occasional use international television service and INTELSAT Business Service (IBS) to any and all countries in the Atlantic Ocean region served by the INTELSAT system. In addition, HBOIT requests modification of an existing license for the Hauppauge, New York earth station (call sign E4063) operated by Home Box Office, Inc., to add the INTELSAT Atlantic Ocean Region Satellites as points of communication. Further, HBOIT requests that it be named as co-licensee with HBO of the Hauppauge earth station for purposes of providing IBS and international television services. The applications were placed on public notice on May 28, 1986. No comments were received.

2. In its Report and Order in the *Earth Station Ownership Proceeding* in CC Docket No. 82-540, the Commission modified its policy on the ownership and operation of U.S. international earth stations that access the INTELSAT system by permitting carriers, individually or jointly, to own and operate their own earth station facilities.[1] In that Order, the Commission distinguished between IBS and/or television earth stations and multipurpose stations. It determined that earth stations dedicated to providing IBS and/or television services do not raise the same concerns about impact on the INTELSAT system that are raised by multipurpose stations. It also determined that the public interest requires that IBS be introduced in the United States as soon as possible. The Commission therefore concluded that it would consider only minimal legal, financial, and technical qualifications of the applicant as required by Sections 308 and 319 of the Communications Act, when processing IBS and television service applications. The Commission further concluded that absent special problems, it would treat these applications as routine and expeditiously process them.[2] The Commission has granted many applications to construct and operate IBS earth stations based on this approach.[3]

3. HBOIT has the legal, technical, and financial qualifications to be a co-licensee of the Hauppauge, New York earth station and to operate it for IBS and international television services pursuant to the same Section 214 blanket authority that has been granted to other carriers for the provision of IBS and international television services.[4] HBOIT is a division of Home Box Office Communications, Inc. (HBOCI), a wholly-owned subsidiary of Home Box Office, Inc. (HBO), the present licensee of the Hauppauge, New York earth station. HBO is a leading provider of domestic pay television. It currently utilizes its Hauppauge earth station facilities for distribution of video and audio programming in the United States via domestic satellite transmission service. HBOIT has been created for the purpose of offering international common carrier services, specifically International Television Transmission and Reception Service and IBS. The proposed modification of the earth station complies with INTELSAT criteria for IBS/television stations. HBOIT has completed the necessary frequency coordination. A grant of blanket authority here would be consistent with the action we took in other decisions and in the public interest.

4. The scope of operation of the proposed station will be the same as that permitted by the Commission in previous IBS/television authorizations. We will limit the authorization to the provision of IBS and international television services. To the extent that the applicant may seek to provide certain newly proposed INTELSAT services which fall within the IBS/television service category, we will not restrict operation of the proposed station. However, HBOIT may not provide any service which falls outside the IBS/television service category. Any authorizarion to use the proposed station as a multipurpose earth station would require a determination as to traffic and revenue diversion from existing multipurpose earth stations that may result.

5. Accordingly, IT IS ORDERED pursuant to Sections 214, 304, 309 and 319 of the Communications Act of 1934, and Section 201(c) of the Communications Satellite Act of 1962, that applications File Nos. I-T-C-86-100 and 1193-DSE-ML-86 ARE GRANTED; and HBOIT IS AUTHORIZED to establish channels of communication between U.S. earth stations and INTELSAT AOR satellites for provision of IBS and related digital video services and international television service between the U.S. and those countries that now or hereafter will be listed in Comsat's tariff provisions for the space segment component of IBS or digital video services and international television service. Provided, however, that this blanket Section 214 authorization is without commitment as to the Commission's action on any IBS/television earth station Title III applications that applicant may file in the future.

6. IT IS FURTHER ORDERED that the license for the Hauppauge, New York earth station is modified to add HBOIT as a co-license and HBOIT is authorized to realign the antenna for provision of IBS and related digital video service and international television services.[5] Before the completion of the equipment installation and facility

activation, however, the applicant should provide the Commission with a summary of actual installed equipment.

7. The Section 214 authorization granted herein is effective on the release date of this order and shall be continued year-to-year unless the Commission notifies the applicant to the contrary and requires that a new application be filed. Should the Commission require that a new application be filed, the authorization will continue in efect until Commission action on the application.

8. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to insure non-discriminatory use of, and equitable access to, the communications satellite system.

9. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of operating agreements between HBOIT and its correspondents, and copies of the agreements shall be filed with the Commission within 30 days of their execution.

10. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATION COMMISSION

James L. Ball
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] Earth Station Ownership, 100 FCC 2d 250 (1984).

[2] Upon grant of an IBS/television service application, the applicant will be issued a combined Radio Station Construction Permit and License (FCC Form 456-P). While the Commission will limit the use of the authorized facilities to the provision of IBS or television services, carriers may seek additional authorization if they desire to use these facilities as multipurpose earth stations.

[3] *See* cases cited in Satellite Gateway Communications, Inc., Mimeo No. 2696 (released March 4, 1986) and American Telephone and Telegraph Co., Mimeo No. 3327 (released March 25, 1986).

[4] For IBS services, see Vitalink International Communications, Inc., Mimeo No. 687 (released November 7, 1984). See also, Communications Satellite Corporation, Mimeo No. 6564 (released September 14, 1984), and American Telephone and Telegraph Co. *et al.*, (File Nos. I-T-C-85-035, *et al.*), Mimeo No. 3220 (released March 18, 1985). For international television services, see AT&T *et al.*, 18 FCC 2d 402 (1969), and ITTWC *et al.*, 76 FCC 2d 26 (1980).

[5] This authorization is not to be construed as permitting the provision of IBS earth stations locted within the United States.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 86-397

Amendment of Part 97 to Authorize Additional Privileges in the 40 Meter Band to Novice and Technician Control Operators at Amateur Stations in Alaska, Hawaii, Region 2 Pacific Insular areas and the Caribbean Insular areas.	RM-5361

ERRATUM

Released: October 30, 1986

The next to the last sentence in paragraph 4 of the Notice of Proposed Rule Making (FCC 86-431) adopted October 6, 1986, in the above-entitled proceeding is corrected to read as follows:

> We took this action because we believed it will significantly improve international amateur radiocommunication in the Caribbean Insular areas without creating undue congestion in the continental United States.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: November 5, 1986

FEDERAL-STATE JOINT BOARD ESTABLISHES SERVICE LIST IN CC Docket No. 86-297

On July 25, 1986, the Federal-State Joint Board in CC Docket No. 86-297 issued an Order Inviting Comments and Request for Data, *Amendment of Part 67of the Commission's Rules and Establishment of a Federal-State Joint Board*, CC Docket No. 86-297, FCC 86J-4, released July 25,1986. In Public Notice, Mimeo No. 712, released on September 25,1986, relative to this Docket, parties were informed that if they wished to receive copies of the comments, not the data, filed in this proceeding, they should file an original and five copies of a statement so indicating with the Secretary of the Commission no later than October 10, 1986.

Based on those filings, the Federal-State Joint Board has established the attached official service list. Parties who have filed comments due October 17, 1986, regarding the proposed Class A Separations Manual should insure that copies of their comments have been sent to all parties on the attached service list.

For further information regarding the attached service list, contact Michael Wilson, (202) 632-7500.

APPENDIX

CC DOCKETNO. 86-297SERVICE LIST

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Before the
Federal Communications Commission
Washington, D.C. 20554

October 15, 1986 Released: October 30, 1986

8940-MLB

GOS Broadcasting Corporation
113 East De Diego Street
Mayaguez, Puerto Rico 00708

Re: Station WUIA-TV
San German, PR
BMPCT-860528KM

Gentlemen:

On July 29, 1986, the Chief, Video Services Division, denied your above-captioned application for an extension of time within which to construct Station WUIA-TV, San German, Puerto Rico, cancelled your construction permit, and deleted the call sign. This is with respect to your August 28, 1986, petition for reconsideration of that action.

The Commission's records show that your application for a construction permit for the station was granted October 19, 1982, and you were afforded until April 19, 1984, in which to complete construction. Based on your representations that you had secured your transmitter site and were expecting delivery of your equipment, you were granted two extensions of time to construct, and your construction permit was extended until May 29, 1985. On May 22, 1985, you filed your third request for an extension of time. In that application, you reported that your tower was under construction, delivery of equipment was expected in June, 1985, and that earlier difficulties in acquiring programming and financing had been resolved. On the basis of your representation that operations would begin in July, 1985, your application was granted on May 30, 1985, extending the completion date to November 29, 1985. On November 22, 1985, you filed your fourth application for additional time to build, reporting that the transmitter building and the tower had been completed but that your equipment supplier had been unable to deliver your equipment as scheduled. You reported that the equipment would be further delayed by the destruction of your access road by floods. Based on your representation that you were in the process of rebuilding the road and that the delivery of equipment was imminent, your application was granted on December 18, 1985, extending the completion date to May 29, 1986.

On May 28, 1986, you filed this, your fifth application, for an extension of time to construct. In support of your request, you asserted that you had entered into an affiliation agreement with Seglares Iglesia Catolica, Inc. (Seglares), licensee of Station WVEO(TV) in Aguadilla, Puerto Rico, for the acquisition of programming, but that Seglares had recently reneged on that agreement. Since so many of your projections were based on that programming relationship, you argued that you needed to "rethink your position and make other arrangements." You therefore concluded that sale of the permit was necessary, and you asked the Commission to defer action on your extension request until an assignment application could be filed.

In denying your extension request, we noted that you had failed to respond to Question 6 of the application as to whether equipment had been delivered and construction commenced and as to what the estimated date of completion was. We found that you had had more than 3 1/2 years to construct the station and that you had twice led the Commission to believe that the commencement of operation was imminent. We stated that we had been understanding and patient in granting four extensions, but that it was apparent that you wished to sell the permit rather than build and operate the station. In this regard, we noted that it was

Commission policy not to grant additional time for the purpose of allowing a permittee to seek an assignee in order to recoup its out-of-pocket expenses. *MG - TV Broadcasting Co. v.* F.C.C., 408 F 2d. 1257 D.C. Cir. 1968). We also found that your affiliation and programming arrangements, as well as your equipment plans, were the result of private business decisions and that problems arising therefrom were not causes beyond your control which prevented construction. Finally, we concluded that the public interest would be better served by cancelling your construction permit and making the channel available for application by others. Accordingly, on July 29, 1986, your extension application was denied, your construction permit was cancelled, and the call letters were deleted. Your petition for reconsideration of that action followed on August 28, 1986.

In support of your petition, you argue that much of the delay in construction was caused by factors beyond your control. First, you state that you were delayed in securing a lease for the transmitter site by the fact that you needed the concurrence of several individuals. Until the lease was obtained, you state that work on the access road could not begin. Then, although the road was completed, you assert that it was destroyed by flooding and had to be rebuilt. You further argue that your inability to get Seglares to honor its programming agreement with you is a matter beyond your control. You maintain that you reasonably placed your trust in the fact of such affiliation and made your plans accordingly. You also allege that *MG - TV Broadcasting, supra*, is inapposite to the facts of this case, since you already have an assignee and are not seeking an extension of time to find one. In that respect, you submit a letter of intent from Aurio Matos to purchase the construction permit for $76,000, payable over a three-year period commencing three months after the station starts operation. You assert that this is less than your actual expenses and that your deprivation of immediate reimbursement constitutes a further expense that cannot be recouped. Accordingly, you argue that this case is more analogous to *King Communications , Inc .*, 47 R.R. 2d 109 Rev. Bd. 1980), where an extension was granted to permit the assignee to complete construction, than *MG - TV Broadcasting*. You maintain that construction has been substantially completed and that opening the channel to other applicants would delay the initiation of service for several years. On the other hand, you argue that Matos has pledged to have the station on the air within one year. Finally, you contend that assigning the permit to Matos, who is Hispanic, would further the Commission's goal of minority ownership of broadcast facilities, whereas there

would be no such guarantee if the channel were made available to new applicants. *Advancement of Minority Ownership*, 57 R.R. 2d 855 1985).

Before an extension application can be granted, Section 73.3534 b) of the Rules requires a showing that either the station has been substantially completed or that reasons clearly beyond the permittee's control prevented construction and that all possible steps have, nevertheless, been taken to resolve the problem and proceed with construction. Although you allege that the station has been substantially constructed, you have not shown that the equipment has been delivered. Although you previously indicated that the transmitter building and tower had been completed, that was nearly one year ago, and you have not shown that construction has progressed. Construction accomplished one year ago is meaningless if it has not been continued to the point of commencing operations; you may not continue to rely upon such construction to justify further extensions of time. Accordingly, we are unable to conclude that construction of the station has been substantially completed.

Notwithstanding the lack of progress in construction, the Commission can still grant an extension if it finds that reasons clearly beyond the permittee's control prevented construction. Here, again, you allege previous excuses - the time consumed in acquiring the land and the flood that destroyed your access road - to which you now add Seglares' refusal to honor its programming commitment with you. While Seglares' unilateral action may have been beyond your control, your decision to enter into the arrangement in the first instance was the result of a private business decision on your part. The collapse of your programming arrangements should not have affected the physical construction of the station unless you are suggesting that, without this particular arrangement, you would not construct the station. That, of course, would be a circumstance wholly within your control. Moreover, your determination to sell the permit rather than proceed with construction represented yet another business judgment. As a result, we are unable to conclude that your failure to construct was due to circumstances beyond your control.

You further contend that grant of the extension application would be the most expeditious means of initiating service on the channel. In that regard, you note that in *King Communications, Inc., supra*, we found the assignment of a construction permit to constitute an "other matter" warranting grant of an extension, where the assignee made a firm commitment to construct expeditiously and where we were persuaded that the assignment represented the fastest way to have the station activated. Subsequent to the Review Board's decision in *King*, however, the Commission announced that a firmer stance on granting extensions of time within which to construct would henceforth be taken. *See, Revision of Form 301*, 50 R.R. 2d 381, 382 1981); *Mekaoy Company*, 48 R.R. 2d 815 B/C Bur. 1980). Moreover, where, as here, a permittee has failed to take significant steps toward the expeditious construction of a station, the mere filing of an assignment application does not automatically entitle the permittee to grant of its extension application. *New Orleans Channel 20, Inc.*, 60 R.R. 2d 820, 826 1986); *David E. Goff*, 100 F.C.C. 2d 1329 MMB, 1985). In any event, the Commission amended its rules on December 10, 1985, to establish strict guidelines for the granting of broadcast applications for extensions of time to construct. *Construction of Broadcast Stations*, 102 F.C.C. 2d 1054 1985). In so doing, that part of Section 73.3534 a) of the Rules that had permitted grant upon a showing of "other matters," such as the pendency of an assignment application, was deleted. Accordingly, the existence of your agreement with Matos to assign the construction permit is not a factor which we consider in evaluating your extension application, nor is your argument that grant of the assignment application which has yet to be filed) would be the most expeditious means of initiating service on the channel. We have already found that there has not been substantial progress on the construction of the station. Consequently, the only time saved by the transfer would appear to be that which would be consumed in a comparative proceeding to assess the qualifications of other applicants. It is well established, however, that "[t]his marginal shortening of a purely administrative delay must be weighed against the public interest in having service provided by the best qualified applicant available." *MG - TV Broadcasting Company, supra*. After a thorough review of your application, we are unable to conclude that assignment of your construction permit would significantly hasten the initiation of service to the public. In any event, it has long been our policy not to grant an extension of time solely for the purpose of assigning a construction permit. *Continental Summit Television Corp.*, 21 R.R. 2d 345 1971).

Finally, we reject your contention that assigning the permit to Matos would further our goal of minority ownership of broadcast stations, whereas there would be no such guarantee if the channel were made available to new applicants. Although the Commission does encourage the ownership of broadcast properties by minorities, it does so only consistent with our Rules. Consequently, the fact that Matos is Hispanic cannot be considered as a justification for your failure to construct within the time provided.

The stark fact is that, after four years, the station remains unbuilt and the public has been deprived of service from San German's only authorized television station. In the past year, you have not taken any significant steps toward completion of the station. Moreover, it appears that your failure to do so was, in large part, due to your inability to obtain programming from Seglares. Your consequent decision to sell the construction permit, rather than proceed with construction, was clearly a business judgment wholly within your control. Accordingly, for the reasons stated above, your petition for reconsideration IS DENIED, and your request for stay IS DISMISSED as moot.

Sincerely,

Roy J. Stewart, Chief
Video Services Division
Mass Media Bureau
Federal Communications Commission

cc: James A. Koerner, Esq.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

PACIFIC BELL Transmittal No. 1190

Revisions to Tariff F.C.C. No. 128

ORDER

Adopted: October 10, 1986; Released: October 30, 1986

By the Chief, Common Carrier Bureau:

1. The above-captioned tariff revisions were filed by Pacific Bell on July 18, 1986, and are scheduled to become effective on October 23, 1986. By these revisions, Pacific Bell proposes to establish a separate rate element for an interim 800 Service.[1]

2. Petitions to reject or, in the alternative, to suspend and investigate the proposal were filed on August 4, 1986, by MCI Telecommunications Corporation (MCI) and US Sprint Communications Corporation (US Sprint). MCI argues that the proposed revisions: (1) overstate the marketing expenses included in Pacific Bell's revenue requirements for 800 Service; (2) incorrectly exclude 800 Service originating minutes in calculating premium Feature Group A (FGA) and Feature Group B (FGB) minutes; and (3) improperly assess carrier common line (CCL) charges upon FGA calls that terminate onto WATS access lines.

3. US Sprint contends that Pacific Bell's tariff: (1) fails to charge non-premium rates when 800 Service is offered through unconverted end offices; (2) improperly assesses 800 Service charges for call "attempts" rather than "connects"; and (3) contains vague language regarding the protocol to be used to provide 800 Service.

4. In its reply, Pacific Bell states that it proposes to apply CCL charges to FGA calls due to limitations in its billing system. During informal discussions with Bureau staff, however, Pacific Bell indicated that these limitations could be corrected within 30 days. Consequently, it has agreed to insert in its tariff a statement to the effect that the CCL charges would apply to FGA lines only until November 15, 1986. Last, Pacific Bell explains that it includes marketing expenses not to recover costs of marketing to the interexchange carriers (ICs), as MCI believes, but to recover the costs associated with filling and implementing the ICs' 800 Service orders.

5. Pacific Bell subsequently requested and was granted special permission to amend certain proposed provisions relating to the application of 800 Service charges, Feature Group rate calculations and the signalling protocol to be used with 800 Service.[2] In particular, Pacific Bell amended its proposed tariff to indicate that it would not assess CCL charges on FGA calls terminated onto WATS access lines after November 15, 1986. It explained that it needed this additional time to modify its billing system to identify the calls that should not be assessed CCL charges.[3] Pacific Bell also provided that 800 Service charges would be assessed based upon calls "connected" to an IC.

6. The Common Carrier Bureau has reviewed the tariff, the petitions, Pacific Bell's reply, and Pacific Bell's proposed amendments. We find that the petitioners have not demonstrated any patent violation of the Communications Act or the Commission's Rules that would warrant rejection of Pacific Bell's proposed tariff. We further find that the proposed tariff does not warrant suspension or investigation at this time.

7. Although we are permitting Pacific Bell's proposal to become effective as scheduled, its tariff remains subject to the outcome of our proceeding in CC Docket No. 86-279.[4] That proceeding was initiated to determine the appropriate separations methodology to apply in the development of the costs associated with interim 800 Service. Pacific Bell proposes to allocate 800 Service investment and related expenses based on a methodology similar to that under investigation in that proceeding.

8. Accordingly, IT IS ORDERED that the petitions to reject or, in the alternative, to suspend and investigate filed by MCI Telecommunications Corporation and US Sprint Communications Corporation against Pacific Bell, Tariff F.C.C. No. 128, Transmittal No. 1190, ARE DENIED.

9. IT IS FURTHER ORDERED that the petition for waiver of Part 69 of the Commission's Rules to establish a separate rate element to recover 800 Access Service costs, filed by Pacific Bell on July 18, 1986, IS GRANTED.

10. IT IS FURTHER ORDERED that Pacific Bell's request for waiver of Section 69.203(g) of the Commission's Rules, 47 C.F.R. § 69.203(g), to allow it to assess carrier common lines charges on calls terminated onto WATS access lines until November 15, 1986, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Albert Halprin
Chief, Common Carrier Bureau

FOOTNOTES

[1] Pacific Bell also filed a petition on July 18, 1986, requesting waiver of portions of Part 69 of the Commission's Rules, 47 C.F.R. Part 69, to allow it to establish a separate rate element for the recovery of costs incurred in providing interim 800 Service. We grant Pacific's petition for the same reasons and under the same conditions as set forth in our Order in Petitions for Waiver of Part 69 to Provide Exchange Access for 800 Service, Mimeo No. 4560, released May 16, 1986, at para. 11.

[2] Pacific Bell Application No. 110, filed Sept. 3, 1986, and amended Oct. 9, 1986; *see also* Letter from Chief, Tariff Division, to G.W. McBee, Pacific Bell (Oct. 20, 1986).

[3] Pacific Bell also requested a temporary waiver of Section 69.203(g) of the Commission's Rules, 47 C.F.R. § 69.203(g), so that it may assess CCL charges on WATS access lines. We grant Pacific Bell's waiver request as no party appears to be significantly prejudiced; customers may avoid CCL charges by waiting until November 15 before ordering service and, in any event, the actual CCL charges assessed are likely to be minimal during the initial period after a customer's service is first installed.

[4] *See* Interim 800 Exchange Access Tariffs, Memorandum Opinion and Order Designating Issues for Investigation, Mimeo No. 5586, released July 3, 1986.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems	GEN Docket No. 84-1231 RM-4812
Amendment of Parts 2, 15, and 90 of the Commission's Rules and Regulations to Allocate Frequencies in the 900 MHz Reserve Band for Private Land Mobile Use	GEN Docket No. 84-1233 RM-4829
Amendment of Parts 2, 22 and 25 of the Commission's Rules to Allocate) Spectrum for, and to Establish Other Rules and Policies Pertaining to the Use of Radio Frequencies in a Land Mobile Satellite Service for the Provision of Various Common Carrier Services	GEN Docket No. 84-1234 RM-4247

Erratum

Released: October 30, 1986

The Commission's Report and Order, FCC 86-333, released September 26, 1986 is corrected by changing the last sentence of paragraph 164 to read: "These amendments become effective November 21, 1986." Also, there is a correction to the table appearing on page 64. The band listed in the middle column of the second row is changed to read "1646.5-1651.0". Finally, on page 67, the table should list footnote "(10)" rather than footnote (9) under the column for maximum effective radiated power in the frequency range 929 to 930 MHz.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-364

Amendment of Section 73.202(b)	RM-5223
Table of Allotments,	RM-5476
FM Broadcast Stations.	
(Lompoc, California)	

ERRATUM

Released: October 30, 1986

The Notice of Proposed Rule Making, DA 86-64, released October 22, 1986 in the above-entitled matter is corrected to change "MM Docket No. 86-364 to MM Docket No. 86-384."

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-377

Amendment of Section 73.202(b) Table of Allotments, FM Broadcast Stations. (Manteo, North Carolina)	RM-5409

ERRATUM

Released: October 30, 1986

The Notice of Proposed Rule Making released October 16, 1986 in the above entitled proceeding is corrected to change the rule making from RM-5470 to RM-5409.

FEDERAL COMMUNICATIONS COMISSION

William J. Tricarico
Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

MM Docket No. 86-398

JOHN T. GALANSES & BETSY ANN ABRUE VASQUEZ DE LOPEZ D/B/A/ CHARLESTON COUNTY WIRELESS CO. (hereafter "County") Folly Beach, South Carolina Req: 97.7 MHz, Channel 249A 3 kW (H & V), 100 meters — File No. BPH-840816ID

CHARLESTON COMMUNICATIONS (hereafter "Charleston") Folly Beach, South Carolina Req: 97.7 MHz, Channel 249A 3 kW (H & V), 100 meters — File No. BPH-841029IA

J. ALLEN WASHINGTON (hereafter "Washington") Folly Beach, South Carolina Req: 97.7 MHz, Channel 249A 3 kW (H & V), 99 meters — File No. BPH-841030IW

LEVI E. WILLIS, II (hereafter "Willis") Folly Beach, South Carolina Req: 97.7 MHz, Channel 249A 3 kW (H & V), 100 meters — File No. BPH-841031IB

FOLLY BEACH COMMUNICATIONS, INC. (hereafter "Communications") Folly Beach, South Carolina Req: 97.7 MHz, Channel 249A 3 kW (H & V), 100 meters — File No. BPH-841031IC

JOANNE BREHM (hereafter "Brehm") Folly Beach, South Carolina Req: 97.7 MHz, Channel 249A 3 kW (H & V), 100 meters — File No. BPH-841031IE

OGDEN BROADCASTING OF SOUTH CAROLINA, INC. (hereafter "Ogden") Folly Beach, South Carolina Req: 97.7 MHz, Channel 249A 3 kW (H & V), 100 meters — File No. BPH-841031IF

For Construction Permit
for a New FM Station

HEARING DESIGNATION ORDER

Adopted: October 10, 1986 **Released: October 31, 1986**

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. In the interest of administrative efficiency and resource economy, portions of this Order have been standardized. Consequently, opinion paragraphs, issues and ordering clauses will only apply where an "X" appears in an appropriate box. If the paragraph is directed to some, but not all, of the captioned applicants, those affected will be specified. In addition, non-standardized text in this Order, if any, will be set forth in an Appendix.

OPINION PARAGRAPHS

Local Notice

Applicable	Inapplicable
[ ]	[X]

3. Applicants for new broadcast stations are required by Section 73.3580 of the Commission's Rules to give local notice of the filing of their applications. We have no indication that the applicant(s) below published the required notice. To remedy this deficiency, the applicant(s) must publish local notice of the application, if it has not already done so, and so inform the presiding Administrative Law Judge within 30 days of the release of this Order, or an appropriate issue will be specified by the Judge.

APPLICANT(S):

Applicable	Inapplicable
[ ]	[X]

4. Applicants for new broadcast stations are required by Section 73.3580 of the Commission's Rules to give local notice of the filing of their applications. The applicant(s) below has published the required notice, but the notice is deficient. To remedy this deficiency, the applicant(s) must republish an amended local notice of the application, if it has not already done so, and so inform the presiding Administrative Law Judge within 30 days of the release of this Order, or an appropriate issue will be specified by the Judge.

APPLICANT(S) DEFICIENCY

Main Studio Justification

Applicable	Inapplicable
[ ]	[X]

5. Section 73.1125 of the Commission's Rules requires that the main studio of an FM station be located within the city of license, but that on a showing of good cause may be located outside that community. The applicant(s) below proposes to locate its main studio outside that community and gives the following justification(s):

APPLICANT(S) LOCATION(S) JUSTIFICATION(S)

(a) good cause has been shown by the following applicant(s) for the proposed main studio location:

(b) good cause has not been shown by the following applicant(s) and, accordingly, an issue will be specified.

Applicable	Inapplicable
[ ]	[X]

6. Section 73.1125 of the Commission's rules requires that the main studio of an FM station be located within the city of license, but that on a showing of good cause may be located outside that community. The applicant(s) below states in its response to Item 12, Section V-B, Form 301, that its main studio will be at a location to be determined, with no indication that the determination would be limited to sites within the city of license. Under these circumstances, the applicant(s) will be required to file with the presiding Administrative Law Judge, within 30 days of the release of this Order, either an amended response to the above-referenced item and/or, if applicable, a showing of good cause should it propose to locate its main studio outside the city of license, or an appropriate issue will be specified by the Judge.

APPLICANT (S):

City Coverage Waiver

Applicable	Inapplicable
[X]	[ ]

7. The engineering data submitted by the applicant(s) below does not clearly demonstrate that it provides a 3.16 mV/m signal to the entire proposed city of license, as required by Section 73.315(a) of the Commission Rules:

APPLICANT (S)	WAIVER JUSTIFICATION (S)
County	
Charleston	
Washington	
Communications	See Appendix
Ogden	
Willis	
Brehm	

(a) The following applicant(s) has submitted facts and circumstances which persuade us that grant of a waiver of Section 73.315(a) would be in the public interest: County, Charleston, Washington, Communications, Ogden

(b) The following applicant(s) has not shown circumstances which warrant a waiver of 73.315(a) and, accordingly, an issue will be specified:

Willis (See Appendix)

Brehm (See Appendix)

(c) The following applicant(s) has not requested a waiver of 73.315(a) and, accordingly, an issue will be specified:

Financial Qualifications

Applicable	Inapplicable
[ ]	[X]

8. The material submitted by the applicant(s) below does not demonstrate its financial qualifications. Accordingly, an issue will be specified concerning the following deficiency:

APPLICANT (S)	DEFICIENCY

Applicable	Inapplicable
[ ]	[X]

9. The applicant(s) below has certified as to its financial qualifications. The certification, however, does not substantially meet the certification set out in revised Section III, Form 301. Accordingly, the applicant(s) will be given 30 days from the release of this Order to submit to the presiding Administrative Law Judge the certification required by the form or to advise the Judge that it cannot make the required certification. In the latter event, the Judge shall specify an appropriate issue.

APPLICANT (S):

Programming Statement

Applicable	Inapplicable
[X]	[ ]

10. The applicant(s) below has not submitted a description in narrative form of proposed programming relating to the issues of public concern facing its service area, pursuant to Paragraph 1, Section IV, Form 301. Accordingly, the applicant(s) will be required to file within 30 days of the release of this Order a narrative programming statement with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

APPLICANT (S):

Charleston

E.E.O.

Applicable	Inapplicable
[ ]	[X]

11. The material submitted by the applicant(s) below fails to indicate that it will have less than five full-time employees. The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301, and supply a statement detailing hiring and promotion policies even though there may be only a few members of minorities residing within the proposed service area. Accordingly, the applicant(s) will be required to file this Section VI information within 30 days of the release of this Order with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

APPLICANT (S):

Late Filed Amendments

Applicable	Inapplicable
[X]	[ ]

12. The applicant(s) below has petitioned for leave to amend its application on the date(s) shown. The accompanying amendment(s) was(were) filed after the "B" cut-off date, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment(s) is accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment(s) will be disallowed.

APPLICANT (S)	DATE AMENDMENT (S) FILED
County	August 16, 1985; January 3, 1986
Brehm	August 7, 1985
Willis	February 19, 1986; May 27, 1986

Areas & Populations

Applicable	Inapplicable
[X]	[ ]

13. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

Contingent Comparative

Applicable	Inapplicable
[ ]	[X]

14. The respective proposals, although for different communities, would serve substantial areas in common. Consequently, in addition to determining, pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service, a contingent comparative issue will also be specified.

Different Communities 307(b)

Applicable	Inapplicable
[ ]	[X]

15. The respective proposals are for different communities. Consequently, it will be necessary to determine pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio services.

Air Hazard

Applicable	Inapplicable
[ ]	[X]

16. Since no determination has been received from the Federal Aviation Administration as to whether the antenna proposed by the applicant(s) below would constitute a hazard to air navigation, an issue with respect thereto will be included and the F.A.A. made a party to the proceeding.

APPLICANT(S):

17. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

18. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

ISSUES

Main Studio

Applicable	Inapplicable
[ ]	[X]

To determine, pursuant to Section 73.1125, whether good cause exists for the proposed location of its main studio outside the community of license by the following applicant(s):

City Coverage

Applicable	Inapplicable
[X]	[ ]

1. To determine whether the proposal of the following applicant(s) would provide coverage of the city sought to be served, as required by Section 73.315(a) of the Commission's Rules, and, if not, whether circumstances exist which warrant waiver of that Section: Willis, Brehm

Financial Qualifications

Applicable	Inapplicable
[ ]	[X]

To determine with respect to the following applicant(s) whether, in light of the evidence adduced concerning the deficiency set forth above in paragraph 8, the applicant(s) is financially qualified:

Air Hazard

Applicable	Inapplicable
[ ]	[X]

To determine whether there is a reasonable possibility that the tower height and location proposed by the following applicant(s) would constitute a hazard to air navigation:

307(b)

Applicable	Inapplicable
[ ]	[X]

To determine: (a) the areas and populations which would receive primary aural service (1 mV/m or greater in the case of FM) from the proposals and the availability of other primary service to such areas and populations, and (b) in light thereof and pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service.

Contingent Comparative

Applicable	Inapplicable
[ ]	[X]

To determine, in the event it is concluded that choice between the applications should not be based solely on considerations relating to Section 307(b), which of the proposals would, on a comparative basis, best serve the public interest.

Comparative

Applicable	Inapplicable
[X]	[ ]

3. To determine which of the proposals would, on comparative basis, best serve the public interest.

Ultimate

Applicable	Inapplicable
[X]	[ ]

4. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

ORDERING CLAUSES

Legal Notice

Applicable	Inapplicable
[ ]	[X]

19. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, the following applicant(s) shall inform the presiding Administrative Law Judge as to whether local notice of filing of the application has been published:

Applicable	Inapplicable
[ ]	[X]

20. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, the following applicant(s) shall inform the presiding Administrative Law Judge as to whether a corrected local notice of the filing of the application has been republished:

Main Studio Justification

Applicable	Inapplicable
[ ]	[X]

21. IT IS FURTHER ORDERED, That the following applicant(s) shall file with the presiding Administrative Law Judge, within 30 days of the release of this Order, an amended response to Item 12, Section V-B, Form 301, and, if appropriate, a showing of good cause if its respective main studio will be located outside the city of license:

City Coverage Waiver

Applicable	Inapplicable
[X]	[ ]

22. IT IS FURTHER ORDERED, That, as to the following applicant(s), the provisions of Section 73.315(a) ARE WAIVED to permit a signal level of less than 3.16 mV/m over the entire city of license: County, Charleston, Washington, Communications, Ogden

Financial Qualifications

Applicable	Inapplicable
[ ]	[X]

23. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, the following applicant(s) shall submit the financial certification required by Section III, Form 301, or advise the presiding Administrative Law Judge that the required certification cannot be made:

Programming Statement

Applicable	Inapplicable
[X]	[ ]

24. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, the following applicant(s) shall file an amendment with the presiding Administrative Law Judge describing its planned programming service relating to the issues of public concern facing its proposed service area:

Charleston

E.E.O.

Applicable	Inapplicable
[ ]	[X]

25. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, the following applicant(s) shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge:

Late Filed Amendments

Applicable	Inapplicable
[X]	[ ]

26. IT IS FURTHER ORDERED, That the petition for leave to amend filed by the following applicant(s) IS GRANTED, and the corresponding amendment(s) IS ACCEPTED to the extent indicated herein: County, Brehm, Willis

Air Hazard

Applicable	Inapplicable
[X]	[ ]

27. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.
(See Appendix)

28. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

29. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

30. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

APPENDIX

Additional Opinion Paragraphs

31. *County*. The City of Folly Beach has filed an informal objection to County's application alleging that the applicant has not made a commitment to local programming and that the station will not be located in the community of Folly Beach. The city requests that the frequency be awarded to a local applicant. County's application contains a satisfactory programming statement. County has indicated a number of community needs and has stated that the station will develop programming to meet these needs. Furthermore, Commission Rules do not require broadcast stations to construct their transmission facilities within the community of license. Rather, 47 C.F.R. § 73.1125 requires stations to have main studios within the community of license. County has certified that it will comply with this rule. Finally, the Commission does not seek out applicants for broadcast stations. Rather, our function is to determine whether an applicant is qualified to construct and operate as proposed and, if, as the case here, there are several applicants for a frequency, the Commission makes a determination which applicant would best serve the public interest. Since the informal objection of the City of Folly Beach fails to raise any substantive matters, it will be dismissed.

32. *Willis*. On April 15, 1985, in response to the Commission request letter of March 27, 1985, (see paragraph 33) Willis submitted an engineering amendment consisting of a 7.5 minute topographic site map. The map submitted does not comply with the letter request in that it was a reduced scale portion of the requisite quadrangle map.[1] Accordingly, Willis will be required to submit the proper full scale map, as a corrective amendment, to the Administrative Law Judge within 30 days of the release of this Order.

33. *Brehm*. Initial engineering review of all applications in this proceeding identified common engineering problems relating to the site maps filed. Therefore, on March 27, 1985, the Chief, FM Branch wrote to all the applicants jointly and requested clarification of their applications in this regard. The clarifying amendment was to be filed within 30 days of the date of the letter, or in the case where a minor amendment was necessary to bring an application into compliance with Commission Rules, such amendment was to be filed not later than the established B cut-off date of April 15, 1985.

34. On June 10, 1985, in response to the Commission request, Brehm petitioned to file a minor engineering amendment to its application. On June 18, 1985 County and Willis filed oppositions to the Brehm petition and associated amendment. On June 27, 1985 Brehm filed a reply to these oppositions. As justification for the late-filed amendment Brehm's counsel contends that neither he nor his client were served with a copy of the Commission's letter. In addition, approximately ten days prior to submitting the June 10, 1985 minor amendment, counsel states he learned of the March 27 Commission letter and "in the course of responding to the letter, it was learned that the FAA had refused to approve the full antenna height specified in Mrs. Brehm's original application and that, as a result, it was totally impossible to serve the city of Folly Beach from the transmitter site originally proposed. As a result of these discrepancies, it has been necessary for Mrs. Brehm to find an alternative transmitter site." In opposition, County contends that "since

Brehm did not prosecute her application with due diligence, an untimely curative amendment must not be permitted substantially after the ["B"] 'cut-off' date." Willis states that the Commission's March 27 letter clearly stated that if an application is mutually exclusive, no minor change amendment filed after the "B" cut-off date will be accepted for filing absent a showing of good cause. Furthermore, Willis contends, Brehm has failed to demonstrate sufficient good cause to warrant the grant of her petition.

35. Commission records indicate that on November 19, 1984 the Federal Aviation Administration determined that the antenna heights specified in the Brehm application exceeded the maximum height permitted for safe air navigation and that, as a result, the applicant would have to reduce the height of the proposed antenna from 329 feet above ground to 118 feet. Counsel attempts, in the reply comments, to explain the seven month delay in filing a timely amendment after the FAA's determination by stating that, "Mrs. Brehm received notification from the FAA that said agency would not approve the full tower height she originally requested but, not being an engineer, she did not understand the full implications of this notice (namely, that with reduced tower height, she could not serve the city of Folly Beach)." 47 C.F.R. § 1.65 states in pertinent part, "[e]ach applicant is responsible for the continuing accuracy and completeness of information furnished in a pending application [W]henever the information furnished in the pending application is no longer substantially accurate and complete in all significant respects, the applicant shall as promptly as possible and in any event within 30 days, unless good cause is shown, amend or request the amendment of his application so as to furnish such additional or corrected information as may be appropriate[W]henever there has been a substantial change as to any other matter which may be of decisional significance in a Commission proceeding involving the pending application, the applicant shall as promptly as possible and any event within 30 days, unless good cause is shown, submit a statement furnishing such additional or corrected information as may be appropriate, which shall be served upon parties of record in accordance with § 1.47." At the time the FAA objection was received, Brehm received actual notice of a problem with her application. She failed to take appropriate action by filing an application to change transmitter site until seven months time had elapsed.

36. 47 C.F.R. § 73.3522(a)(2) formerly stated, in pertinent part, that applications may be "amended as a matter of right by the date specified (not less than 30 days after issuance) in FCC's Public Notice announcing the acceptance for filing of the last-filed mutually exclusive application. Subsequent amendments prior to designation of the proceeding for hearing will be considered only upon a showing of good cause for late filing or pursuant to § 1.65 or § 73.3514." Brehm has failed to timely update her application in accordance with 47 C.F.R. § 1.65. Furthermore, the above facts demonstrate lack of good cause for late-filed acceptance of the amendment. Inasmuch as the Commission is not accepting the June 10 attempt to move to a new transmitter site, the applicant's response to the March 27 FM Branch letter is moot and the amendment will be returned. Finally, since the Federal Aviation Administration has objected to Brehm's originally proposed HAAT, an appropate air hazard issue will be specified.

37. Other *Matters* . None of the applicants' proposals provide 70 dBu coverage over the entire community of Folly Beach as required by 47 C.F.R. § 73.315. Five [2] of the applicants have requested a waiver of the rule. Review of the applications shows that 20% of the community of Folly Beach is not covered with a 3.16 mV/m contour. Several reasons for granting the requested waiver have been proffered by these applicants. First, a site restriction was placed on the allocation. The *Report and Order* in Docket 83-1130, Mimeo 5985, released August 13, 1984, placed a restriction on transmitter site location by requiring that a transmitter for the allocation of Channel 249A to Folly Beach, South Carolina be located 3.8 kilometers (2.4 miles) southwest of the community so to avoid a conflict with WGMB(FM), a co-channel in Georgetown, South Carolina. Second, the Federal Aviation Administration has also placed restrictions on proposed sites because of the potential proximity to the Folly Beach airport. Applicants claim these two restrictions make it impossible to locate a site which places a 3.16 mV/m contour over the entire community of Folly Beach. Applicants further claim that the level terrain of the area allows an actual signal to be placed over the entire city in spite of the fact that the 70 dBu contour does not extend over the whole community. In all instances the area not covered is less than two miles. Applicants also claim that less than 100 dwellings are not covered by the required signal and that most of the area not covered is uninhabited marsh land near the edge of the island. For the above mentioned reasons, and due to the fact that this allocation is the first FM channel assigned to Folly Beach, the waiver requests will be granted. As to the Willis proposal, engineering review shows that it does not provide 70 dBu coverage, despite assertions to the contrary. Therefore a city coverage issue will be specified.

Additional Issue Paragraph

38. To determine, in light of the adverse determination by the Federal Aviation Administration, whether the tower height and location proposed by Brehm constitutes a hazard to air navigation.

Additional Ordering Paragraphs

39. IT IS FURTHER ORDERED, That the informal objection filed by the City of Folly Beach IS DISMISSED.

40. IT IS FURTHER ORDERED, That Willis will be required to submit a corrective 7.5 minute topographic map to the presiding Administrative Law Judge within 30 days of the release of the Order.

41. IT IS FURTHER ORDERED, That the June 10, 1985 amendment filed by Brehm IS RETURNED in accordance with 47 C.F.R. § 3522(a)(2) and the pleadings filed by County and Willis ARE GRANTED to the extent indicated above and DENIED in all other respects.

FOOTNOTES

[1] Subsequent to the March 27, 1985 letter, the Commission published a *Public Notice*, Mimeo 3693, released April 5, 1985, which reiterated the specific transmitter site map requirements.

[2] Brehm did not request a waiver of 47 C.F.R. § 73.315 in her original application. She did, however, request a waiver in the June 10 amendment. Since, as noted above, we are returning the June 10th amendment, a city coverage issue will therefore be specified.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

MM Docket No. 86-392

WINSTANLEY BROADCASTING, INC. (hereafter Winstanley) File No. BPH-840210AS
Panama City Beach, Florida
Req: 100.1 MHz, Channel 261A
3.0 kW (H & V), 100 meters

MARCUS D. SLOAN AND HERLINDA VALDEZ THOMPSON d/b/a GULF COAST BROADCASTING (hereafter Gulf Coast) File No. BPH-840228CA
Panama City Beach, Florida
Req: 100.1 MHz, Channel 261A
3.0 kW (H & V), 89 meters

JANE O'QUINN AND KIM E. WALKER d/b/a Panama City Beach Broadcasters (hereafter Panama City) File No. BPH-840608IA
Panama City Beach, Florida
Req: 100.1 MHz, Channel 261A
3.0 kW (H & V), 91 meters

GULF PROPERTY & INVESTMENT COMPANY, Inc. (hereafter Gulf Property) File No. BPH-840611IG
Panama City Beach, Florida
Req: 100.1 MHz, Channel 261A
3.0 kW (H & V), 100 meters

BAY ONE HUNDRED, INC. (hereafter Bay) File No. BPH-840611IS
Panama City Beach, Florida
Req: 100.1 MHz, Channel 261A
3.0 kW (H & V), 100 meters

For Construction Permit
for a New FM Station

HEARING DESIGNATION ORDER

Adopted: October 9, 1986 **Released: October 31, 1986**

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. In the interest of administrative efficiency and resource economy, portions of this Order have been standardized. Consequently, opinion paragraphs, issues and ordering clauses will only apply where an "X" appears in an appropriate box. If the paragraph is directed to some, but not all, of the captioned applicants, those affected will be specified. In addition, non-standardized text in this Order, if any, will be set forth in an Appendix.

OPINION PARAGRAPHS

Local Notice

Applicable	Inapplicable
[ ]	[X]

3. Applicants for new broadcast stations are required by Section 73.3580 of the Commission's Rules to give local notice of the filing of their applications. We have no indication that the applicant(s) below published the required notice. To remedy this deficiency, the applicant(s) must publish local notice of the application, if it has not already done so, and so inform the presiding Administrative Law Judge within 30 days of the release of this Order, or an appropriate issue will be specified by the Judge.

APPLICANT(S):

Applicable	Inapplicable
[ ]	[X]

4. Applicants for new broadcast stations are required by Section 73.3580 of the Commission's Rules to give local notice of the filing of their applications. The applicant(s) below has published the required notice, but the notice is deficient. To remedy this deficiency, the applicant(s) must republish an amended local notice of the application, if it has not already done so, and so inform the presiding Administrative Law Judge within 30 days of the release of this Order, or an appropriate issue will be specified by the Judge.

APPLICANT (S) DEFICIENCY

Main Studio Justification

Applicable	Inapplicable
[ ]	[X]

5. Section 73.1125 of the Commission's Rules requires that the main studio of an FM station be located within the city of license, but that on a showing of good cause may be located outside that community. The applicant(s) below proposes to locate its main studio outside that community and gives the following justification(s):

APPLICANT(S) LOCATION(S) JUSTIFICATION(S)

(a) good cause has been shown by the following applicant(s) for the proposed main studio location:

(b) good cause has not been shown by the following applicant(s) and, accordingly, an issue will be specified.

Applicable	Inapplicable
[ ]	[X]

6. Section 73.1125 of the Commission's rules requires that the main studio of an FM station be located within the city of license, but that on a showing of good cause may be located outside that community. The applicant(s) below states in its response to Item 12, Section V-B, Form 301, that its main studio will be at a location to be determined, with no indication that the determination would be limited to sites within the city of license. Under these circumstances, the applicant(s) will be required to

file with the presiding Administrative Law Judge, within 30 days of the release of this Order, either an amended response to the above-referenced item and/or, if applicable, a showing of good cause should it propose to locate its main studio outside the city of license, or an appropriate issue will be specified by the Judge.
APPLICANT (S):

City Coverage Waiver

Applicable	Inapplicable
[ ]	[X]

7. The engineering data submitted by the applicant(s) below does not clearly demonstrate that it provides a 3.16 mV/m signal to the entire proposed city of license, as required by Section 73.315(a) of the Commission Rules:
APPLICANT (S) WAIVER JUSTIFICATION (S)

(a) The following applicant(s) has submitted facts and circumstances which persuade us that grant of a waiver of Section 73.315(a) would be in the public interest:

(b) The following applicant(s) has not shown circumstances which warrant a waiver of 73.315(a) and, accordingly, an issue will be specified:

(c) The following applicant(s) has not requested a waiver of 73.315(a) and, accordingly, an issue will be specified:

Financial Qualifications

Applicable	Inapplicable
[ ]	[X]

8. The material submitted by the applicant(s) below does not demonstrate its financial qualifications. Accordingly, an issue will be specified concerning the following deficiency:
APPLICANT (S) DEFICIENCY

Applicable	Inapplicable
[ ]	[X]

9. The applicant(s) below has certified as to its financial qualifications. The certification, however, does not substantially meet the certification set out in revised Section III, Form 301. Accordingly, the applicant(s) will be given 30 days from the release of this Order to submit to the presiding Administrative Law Judge the certification required by the form or to advise the Judge that it cannot make the required certification. In the latter event, the Judge shall specify an appropriate issue.
APPLICANT (S):

Programming Statement

Applicable	Inapplicable
[ ]	[X]

10. The applicant(s) below has not submitted a description in narrative form of proposed programming relating to the issues of public concern facing its service area, pursuant to Paragraph 1, Section IV, Form 301. Accordingly, the applicant(s) will be required to file within 30 days of the release of this Order a narrative programming statement with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.
APPLICANT (S): Charleston

E.E.O.

Applicable	Inapplicable
[ ]	[X]

11. The material submitted by the applicant(s) below fails to indicate that it will have less than five full-time employees. The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301, and supply a statement detailing hiring and promotion policies even though there may be only a few members of minorities residing within the proposed service area. Accordingly, the applicant(s) will be required to file this Section VI information within 30 days of the release of this Order with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.
APPLICANT (S):

Late Filed Amendments

Applicable	Inapplicable
[X]	[ ]

12. The applicant(s) below has petitioned for leave to amend its application on the date(s) shown. The accompanying amendment(s) was(were) filed after the "B" cut-off date, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment(s) is accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment(s) will be disallowed.

APPLICANT (S)	DATE AMENDMENT (S) FILED
Winstanley	Dec. 14, 1984
Gulf Coast	Jan. 4, 1986/June 30, 1986
Gulf Property	Mar. 3, 1986

Areas & Populations

Applicable	Inapplicable
[X]	[ ]

13. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

Contingent Comparative

Applicable	Inapplicable
[ ]	[X]

14. The respective proposals, although for different communities, would serve substantial areas in common. Consequently, in addition to determining, pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service, a contingent comparative issue will also be specified.

Different Communities 307(b)

Applicable	Inapplicable
[ ]	[X]

15. The respective proposals are for different communities. Consequently, it will be necessary to determine pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio services.

Air Hazard

Applicable	Inapplicable
[X]	[ ]

16. Since no determination has been received from the Federal Aviation Administration as to whether the antenna proposed by the applicant(s) below would constitute a hazard to air navigation, an issue with respect thereto will be included and the F.A.A. made a party to the proceeding.

APPLICANT(S): Gulf Coast, Gulf Properties

17. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

18. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

ISSUES

Main Studio

Applicable	Inapplicable
[ ]	[X]

To determine, pursuant to Section 73.1125, whether good cause exists for the proposed location of its main studio outside the community of license by the following applicant(s):

City Coverage

Applicable	Inapplicable
[ ]	[X]

1. To determine whether the proposal of the following applicant(s) would provide coverage of the city sought to be served, as required by Section 73.315(a) of the Commission's Rules, and, if not, whether circumstances exist which warrant waiver of that Section: Willis, Brehm

Financial Qualifications

Applicable	Inapplicable
[ ]	[X]

To determine with respect to the following applicant(s) whether, in light of the evidence adduced concerning the deficiency set forth above in paragraph 8, the applicant(s) is financially qualified:

Air Hazard

Applicable	Inapplicable
[X]	[ ]

To determine whether there is a reasonable possibility that the tower height and location proposed by the following applicant(s) would constitute a hazard to air navigation: Gulf Coast, Gulf Properties

307(b)

Applicable	Inapplicable
[ ]	[X]

To determine: (a) the areas and populations which would receive primary aural service (1 mV/m or greater in the case of FM) from the proposals and the availability of other primary service to such areas and populations, and (b) in light thereof and pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service.

Contingent Comparative

Applicable	Inapplicable
[ ]	[X]

To determine, in the event it is concluded that choice between the applications should not be based solely on considerations relating to Section 307(b), which of the proposals would, on a comparative basis, best serve the public interest.

Comparative

Applicable	Inapplicable
[X]	[ ]

3. To determine which of the proposals would, on comparative basis, best serve the public interest.

Ultimate

Applicable	Inapplicable
[X]	[ ]

4. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

ORDERING CLAUSES

Legal Notice

Applicable	Inapplicable
[ ]	[X]

19. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, the following applicant(s) shall inform the presiding Administrative Law Judge as to whether local notice of filing of the application has been published:

Applicable	Inapplicable
[ ]	[X]

20. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, the following applicant(s) shall inform the presiding Administrative Law Judge as to whether a corrected local notice of the filing of the application has been republished:

Main Studio Justification

Applicable	Inapplicable
[ ]	[X]

21. IT IS FURTHER ORDERED, That the following applicant(s) shall file with the presiding Administrative Law Judge, within 30 days of the release of this Order, an amended response to Item 12, Section V-B, Form 301, and, if appropriate, a showing of good cause if its respective main studio will be located outside the city of license:

City Coverage Waiver

Applicable	Inapplicable
[ ]	[X]

22. IT IS FURTHER ORDERED, That, as to the following applicant(s), the provisions of Section 73.315(a) ARE WAIVED to permit a signal level of less than 3.16 mV/m over the entire city of license: County, Charleston, Washington, Communications, Ogden

Financial Qualifications

Applicable	Inapplicable
[ ]	[X]

23. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, the following applicant(s) shall submit the financial certification required by Section III, Form 301, or advise the presiding Administrative Law Judge that the required certification cannot be made:

Programming Statement

Applicable	Inapplicable
[ ]	[X]

24. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, the following applicant(s) shall file an amendment with the presiding Administrative Law Judge describing its planned programming service relating to the issues of public concern facing its proposed service area:
Charleston

E.E.O.

Applicable	Inapplicable
[ ]	[X]

25. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, the following applicant(s) shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge:

Late Filed Amendments

Applicable	Inapplicable
[X]	[ ]

26. IT IS FURTHER ORDERED, That the petition for leave to amend filed by the following applicant(s) IS GRANTED, and the corresponding amendment(s) IS ACCEPTED to the extent indicated herein: Gulf Coast, Gulf Properties, Winstanley

Air Hazard

Applicable	Inapplicable
[X]	[ ]

27. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

28. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

29. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

30. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

APPENDIX(ES)
[ ] IS [X] IS NOT
ATTACHED

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

MM Docket No. 86-402

CHARLES J. SALTZMAN File No. BPH-850702MC
(hereafter Saltzman)
Van Buren, Indiana
Req: 99.3 MHz, Channel 257 A
3.0 kW (H & V), 84.3 meters

MARION COLLEGE File No. BPH-850711MI
(hereafter College)
Van Buren, Indiana
Req: 99.3 MHz, Channel 257 A
3.0 kW (H & V), 100 meters

UMBERGER RADIO File No. BPH-850711MJ
(hereafter Umberger)
Van Buren, Indiana
Req: 99.3 MHz, Channel 257 A
3.0 kW (H & V), 100 meters

MARION RADIO CORPORATION File No. BPH-850711ML
(hereafter Marion)
Van Buren, Indiana
Req: 99.3 MHz, Channel 257 A
3.0 kW (H & V), 100 meters

RANDALL L. (RON) HUSTON File No. BPH-850712MP
(hereafter Huston)
Van Buren, Indiana
Req: 99.3 MHz, Channel 257 A
3.0 kW (H & V), 100 meters

ALTCOM OF INDIANA, INC. File No. BPH-850712MQ
(hereafter Altcom)
Van Buren, Indiana
Req: 99.3 MHz, Channel 257 A
3.0 kW (H & V), 100 meters

For Construction Permit
for a New FM Station

HEARING DESIGNATION ORDER

Adopted: October 14, 1986 **Released: October 31, 1986**

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.[1]

2. In the interest of administrative efficiency and resource economy, portions of this Order have been standardized. Consequently, opinion paragraphs, issues and ordering clauses will only apply where an "X" appears in an appropriate box. If the paragraph is directed to some, but not all, of the captioned applicants, those affected will be specified. In addition, non-standardized text in this Order, if any, will be set forth in an Appendix.

OPINION PARAGRAPHS

Local Notice

Applicable	Inapplicable
[ ]	[X]

3. Applicants for new broadcast stations are required by Section 73.3580 of the Commission's Rules to give local notice of the filing of their applications. We have no indication that the applicant(s) below published the required notice. To remedy this deficiency, the applicant(s) must publish local notice of the application, if it has not already done so, and so inform the presiding Administrative Law Judge within 30 days of the release of this Order, or an appropriate issue will be specified by the Judge.

APPLICANT(S):

Applicable	Inapplicable
[ ]	[X]

4. Applicants for new broadcast stations are required by Section 73.3580 of the Commission's Rules to give local notice of the filing of their applications. The applicant(s) below has published the required notice, but the notice is deficient. To remedy this deficiency, the applicant(s) must republish an amended local notice of the application, if it has not already done so, and so inform the presiding Administrative Law Judge within 30 days of the release of this Order, or an appropriate issue will be specified by the Judge.

APPLICANT (S) DEFICIENCY

Main Studio Justification

Applicable	Inapplicable
[X]	[ ]

5. Section 73.1125 of the Commission's Rules requires that the main studio of an FM station be located within the city of license, but that on a showing of good cause may be located outside that community. The applicant(s) below proposes to locate its main studio outside that community and gives the following justification(s):

APPLICANT(S)	LOCATION(S)	JUSTIFICATION(S)
College	Marion	1. Studio space is available from the Marion College Campus, located approximately ten miles away; and 2. this location is accessible to "its" residence and the students of Marion College "who will actively contribute to the operation of the new FM station".

(a) good cause has been shown by the following applicant(s) for the proposed main studio location:

(b) good cause has not been shown by the following applicant(s) and, accordingly, an issue will be specified. College

Applicable	Inapplicable
[ ]	[X]

6. Section 73.1125 of the Commission's rules requires that the main studio of an FM station be located within the city of license, but that on a showing of good cause may be located outside that community. The applicant(s) below states in its response to Item 12, Section V-B, Form 301, that its main studio will be at a location to be determined, with no indication that the determination would be limited to sites within the city of license. Under these circumstances, the applicant(s) will be required to file with the presiding Administrative Law Judge, within 30 days of the release of this Order, either an amended response to the above-referenced item and/or, if applicable, a showing of good cause should it propose to locate its main studio outside the city of license, or an appropriate issue will be specified by the Judge.

APPLICANT (S):

City Coverage Waiver

Applicable	Inapplicable
[ ]	[X]

7. The engineering data submitted by the applicant(s) below does not clearly demonstrate that it provides a 3.16 mV/m signal to the entire proposed city of license, as required by Section 73.315(a) of the Commission Rules:

APPLICANT (S) WAIVER JUSTIFICATION (S)

(a) The following applicant(s) has submitted facts and circumstances which persuade us that grant of a waiver of Section 73.315(a) would be in the public interest:

(b) The following applicant(s) has not shown circumstances which warrant a waiver of 73.315(a) and, accordingly, an issue will be specified:

(c) The following applicant(s) has not requested a waiver of 73.315(a) and, accordingly, an issue will be specified:

Financial Qualifications

Applicable	Inapplicable
[ ]	[X]

8. The material submitted by the applicant(s) below does not demonstrate its financial qualifications. Accordingly, an issue will be specified concerning the following deficiency:

APPLICANT (S) DEFICIENCY

Applicable	Inapplicable
[ ]	[X]

9. The applicant(s) below has certified as to its financial qualifications. The certification, however, does not substantially meet the certification set out in revised Section III, Form 301. Accordingly, the applicant(s) will be given 30 days from the release of this Order to submit to the presiding Administrative Law Judge the certification required by the form or to advise the Judge that it cannot make the required certification. In the latter event, the Judge shall specify an appropriate issue.

APPLICANT (S):

Programming Statement

Applicable	Inapplicable
[ ]	[X]

10. The applicant(s) below has not submitted a description in narrative form of proposed programming relating to the issues of public concern facing its service area, pursuant to Paragraph 1, Section IV, Form 301. Accordingly, the applicant(s) will be required to file within 30 days of the release of this Order a narrative programming statement with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

APPLICANT (S):

E.E.O.

Applicable	Inapplicable
[ ]	[X]

11. The material submitted by the applicant(s) below fails to indicate that it will have less than five full-time employees. The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301, and supply a statement detailing hiring and promotion policies even though there may be only a few members of minorities residing within the proposed service area. Accordingly, the applicant(s) will be required to file this Section VI information within 30 days of the release of this Order with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

APPLICANT (S):

Late Filed Amendments

Applicable	Inapplicable
[X]	[ ]

12. The applicant(s) below has petitioned for leave to amend its application on the date(s) shown. The accompanying amendment(s) was(were) filed after the "B" cutoff date, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment(s) is accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment(s) will be disallowed.

APPLICANT (S)	DATE AMENDMENT (S) FILED
Saltzman	3/3/86, 7/8/86, 3/34/86
Marion	1/3/86
Altcom	10/8/85, 2/18/86

Areas & Populations

Applicable	Inapplicable
[X]	[ ]

13. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

Contingent Comparative

Applicable	Inapplicable
[ ]	[X]

14. The respective proposals, although for different communities, would serve substantial areas in common. Consequently, in addition to determining, pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service, a contingent comparative issue will also be specified.

Different Communities 307(b)

Applicable	Inapplicable
[ ]	[X]

15. The respective proposals are for different communities. Consequently, it will be necessary to determine pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio services.

Air Hazard

Applicable	Inapplicable
[X]	[ ]

16. Since no determination has been received from the Federal Aviation Administration as to whether the antenna proposed by the applicant(s) below would constitute a hazard to air navigation, an issue with respect thereto will be included and the F.A.A. made a party to the proceeding.

APPLICANT(S): Saltzman, Umberger, Altcom

17. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

18. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

ISSUES

Main Studio

Applicable	Inapplicable
[X]	[ ]

To determine, pursuant to Section 73.1125, whether good cause exists for the proposed location of its main studio outside the community of license by the following applicant(s): College

City Coverage

Applicable	Inapplicable
[ ]	[X]

1. To determine whether the proposal of the following applicant(s) would provide coverage of the city sought to be served, as required by Section 73.315(a) of the Commission's Rules, and, if not, whether circumstances exist which warrant waiver of that Section:

Financial Qualifications

Applicable	Inapplicable
[ ]	[X]

To determine with respect to the following applicant(s) whether, in light of the evidence adduced concerning the deficiency set forth above in paragraph 8, the applicant(s) is financially qualified:

Air Hazard

Applicable	Inapplicable
[X]	[ ]

To determine whether there is a reasonable possibility that the tower height and location proposed by the following applicant(s) would constitute a hazard to air navigation: Saltzman, Umberger, Altcom

307(b)

Applicable	Inapplicable
[ ]	[X]

To determine: (a) the areas and populations which would receive primary aural service (1 mV/m or greater in the case of FM) from the proposals and the availability of other primary service to such areas and populations, and (b) in light thereof and pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service.

Contingent Comparative

Applicable	Inapplicable
[ ]	[X]

To determine, in the event it is concluded that choice between the applications should not be based solely on considerations relating to Section 307(b), which of the proposals would, on a comparative basis, best serve the public interest:

Comparative

Applicable	Inapplicable
[X]	[ ]

3. To determine which of the proposals would, on comparative basis, best serve the public interest.

Ultimate

Applicable	Inapplicable
[X]	[ ]

4. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

ORDERING CLAUSES

Legal Notice

Applicable	Inapplicable
[ ]	[X]

19. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, the following applicant(s) shall inform the presiding Administrative Law Judge as to whether local notice of filing of the application has been published:

Applicable	Inapplicable
[ ]	[X]

20. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, the following applicant(s) shall inform the presiding Administrative Law Judge as to whether a corrected local notice of the filing of the application has been republished:

Main Studio Justification

Applicable	Inapplicable
[ ]	[X]

21. IT IS FURTHER ORDERED, That the following applicant(s) shall file with the presiding Administrative Law Judge, within 30 days of the release of this Order, an amended response to Item 12, Section V-B, Form 301, and, if appropriate, a showing of good cause if its respective main studio will be located outside the city of license:

City Coverage Waiver

Applicable	Inapplicable
[ ]	[X]

22. IT IS FURTHER ORDERED, That, as to the following applicant(s), the provisions of Section 73.315(a) ARE WAIVED to permit a signal level of less than 3.16 mV/m over the entire city of license: County, Charleston, Washington, Communications, Ogden

Financial Qualifications

Applicable	Inapplicable
[ ]	[X]

23. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, the following applicant(s) shall submit the financial certification required by Section III, Form 301, or advise the presiding Administrative Law Judge that the required certification cannot be made:

Programming Statement

Applicable	Inapplicable
[ ]	[X]

24. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, the following applicant(s) shall file an amendment with the presiding Administrative Law Judge describing its planned programming service relating to the issues of public concern facing its proposed service area:
Charleston

E.E.O.

Applicable	Inapplicable
[ ]	[X]

25. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, the following applicant(s) shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge:

Late Filed Amendments

Applicable	Inapplicable
[X]	[ ]

26. IT IS FURTHER ORDERED, That the petition for leave to amend filed by the following applicant(s) IS GRANTED, and the corresponding amendment(s) IS ACCEPTED to the extent indicated herein: Saltzman, Marion, Altcom

Air Hazard

Applicable	Inapplicable
[X]	[ ]

27. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

28. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

29. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

30. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

APPENDIX

Additional Opinion Paragraph

31. Section II, Item 10, FCC Form 301 (1985), inquires whether documents, instruments, agreements or understandings for the pledge of stock of a corporate applicant, as security for loans or contractual performance, provide that (a) voting rights will remain with the applicant, even in the event of a default on the obligation; (b) in the event of default, there will be either a private or public sale of the stock; and (c) prior to the exercise of stockholder rights by the purchaser at such sale, the prior consent of the Commission (pursuant to 47 U.S.C. 310(d)) will be obtained. A negative response to this question requires a full explanation. Saltzman answered "no" to Item 10; however, he did not submit the required explanation. Accordingly, Saltzman will be required to submit an amendment to the presiding Administrative Law Judge.

Additional Ordering Clause

32. IT IS FURTHER ORDERED, that Saltzman shall submit his explanation for answering "no" to Section II, Item 10, FCC Form 301 (1985), to the presiding Administrative Law Judge within 30 days of the release of this Order.

FOOTNOTES

[1] Application of Robert Alan Weaver was dismissed per his request by letter dated 3/13/86.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

MM Docket No. 86-403

KIMBERLY S. HARRISON File No. BPH-840423IG
(hereafter Harrison)
Galveston, Texas
Req: 104.9 MHz, Channel 285A
3 kW (H & V), 91 meters

IRVIN DAVIS File No. BPH-841114ND
(hereafter Davis)
Galveston, Texas
Req: 104.9 MHz, Channel 285A
3 kW (H & V), 100 meters

ELLEN LOUISE GARDNER File No. BPH-841114MN
(hereafter Gardner)
Galveston, Texas
Req: 104.9 MHz, Channel 285A
3 kW (H & V), 91 meters

For Construction Permit
for a New FM Station

HEARING DESIGNATION ORDER

Adopted: October 14, 1986 Released: October 31, 1986

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.[1]

2. In the interest of administrative efficiency and resource economy, portions of this Order have been standardized. Consequently, opinion paragraphs, issues and ordering clauses will only apply where an "X" appears in an appropriate box. If the paragraph is directed to some, but not all, of the captioned applicants, those affected will be specified. In addition, non-standardized text in this Order, if any, will be set forth in an Appendix.

OPINION PARAGRAPHS

Local Notice

Applicable	Inapplicable
[ ]	[X]

3. Applicants for new broadcast stations are required by Section 73.3580 of the Commission's Rules to give local notice of the filing of their applications. We have no indication that the applicant(s) below published the required notice. To remedy this deficiency, the applicant(s) must publish local notice of the application, if it has not already done so, and so inform the presiding Administrative Law Judge within 30 days of the release of this Order, or an appropriate issue will be specified by the Judge.

APPLICANT(S):

Applicable	Inapplicable
[ ]	[X]

4. Applicants for new broadcast stations are required by Section 73.3580 of the Commission's Rules to give local notice of the filing of their applications. The applicant(s) below has published the required notice, but the notice is deficient. To remedy this deficiency, the applicant(s) must republish an amended local notice of the application, if it has not already done so, and so inform the presiding Administrative Law Judge within 30 days of the release of this Order, or an appropriate issue will be specified by the Judge.

APPLICANT (S) DEFICIENCY

Main Studio Justification

Applicable	Inapplicable
[ ]	[X]

5. Section 73.1125 of the Commission's Rules requires that the main studio of an FM station be located within the city of license, but that on a showing of good cause may be located outside that community. The applicant(s) below proposes to locate its main studio outside that community and gives the following justification(s):

APPLICANT(S) LOCATION(S) JUSTIFICATION(S)

(a) good cause has been shown by the following applicant(s) for the proposed main studio location:

(b) good cause has not been shown by the following applicant(s) and, accordingly, an issue will be specified.

Applicable	Inapplicable
[X]	[ ]

6. Section 73.1125 of the Commission's rules requires that the main studio of an FM station be located within the city of license, but that on a showing of good cause may be located outside that community. The applicant(s) below states in its response to Item 12, Section V-B, Form 301, that its main studio will be at a location to be determined, with no indication that the determination would be limited to sites within the city of license. Under these circumstances, the applicant(s) will be required to file with the presiding Administrative Law Judge, within 30 days of the release of this Order, either an amended response to the above-referenced item and/or, if applicable, a showing of good cause should it propose to locate its main studio outside the city of license, or an appropriate issue will be specified by the Judge.

APPLICANT: Harrison

City Coverage Waiver

Applicable	Inapplicable
[X]	[ ]

7. The engineering data submitted by the applicant(s) below does not clearly demonstrate that it provides a 3.16 mV/m signal to the entire proposed city of license, as required by Section 73.315(a) of the Commission Rules:

APPLICANT (S)	WAIVER JUSTIFICATION (S)
Davis	Channel allocation to this city prevents complance with city-grade coverage rules
Gardner	There is no site from which the entire city of Galveston can be covered with principal service due to newly uncorporated city areas.

(a) The following applicant(s) has submitted facts and circumstances which persuade us that grant of a waiver of Section 73.315(a) would be in the public interest: County, Charleston, Washington, Communications, Ogden

(b) The following applicant(s) has not shown circumstances which warrant a waiver of 73.315(a) and, accordingly, an issue will be specified:

Davis

Gardner

(c) The following applicant(s) has not requested a waiver of 73.315(a) and, accordingly, an issue will be specified:

Financial Qualifications

Applicable	Inapplicable
[ ]	[X]

8. The material submitted by the applicant(s) below does not demonstrate its financial qualifications. Accordingly, an issue will be specified concerning the following deficiency:

APPLICANT (S)	DEFICIENCY

Applicable	Inapplicable
[ ]	[X]

9. The applicant(s) below has certified as to its financial qualifications. The certification, however, does not substantially meet the certification set out in revised Section III, Form 301. Accordingly, the applicant(s) will be given 30 days from the release of this Order to submit to the presiding Administrative Law Judge the certification required by the form or to advise the Judge that it cannot make the required certification. In the latter event, the Judge shall specify an appropriate issue.

APPLICANT (S):

Programming Statement

Applicable	Inapplicable
[ ]	[X]

10. The applicant(s) below has not submitted a description in narrative form of proposed programming relating to the issues of public concern facing its service area, pursuant to Paragraph 1, Section IV, Form 301. Accordingly, the applicant(s) will be required to file within 30 days of the release of this Order a narrative programming statement with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

APPLICANT (S):

E.E.O.

Applicable	Inapplicable
[X]	[ ]

11. The material submitted by the applicant(s) below fails to indicate that it will have less than five full-time employees. The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301, and supply a statement detailing hiring and promotion policies even though there may be only a few members of minorities residing within the proposed service area. Accordingly, the applicant(s) will be required to file this Section VI information within 30 days of the release of this Order with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

APPLICANT (S): Gardner (No specific recruitment sources of information submitted)

Late Filed Amendments

Applicable	Inapplicable
[ ]	[X]

12. The applicant(s) below has petitioned for leave to amend its application on the date(s) shown. The accompanying amendment(s) was(were) filed after the "B" cutoff date, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment(s) is accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment(s) will be disallowed.

APPLICANT (S)	DATE AMENDMENT (S) FILED

Areas & Populations

Applicable	Inapplicable
[X]	[ ]

13. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard

comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

Contingent Comparative

Applicable	Inapplicable
[ ]	[X]

14. The respective proposals, although for different communities, would serve substantial areas in common. Consequently, in addition to determining, pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service, a contingent comparative issue will also be specified.

Different Communities 307(b)

Applicable	Inapplicable
[ ]	[X]

15. The respective proposals are for different communities. Consequently, it will be necessary to determine pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio services.

Air Hazard

Applicable	Inapplicable
[X]	[ ]

16. Since no determination has been received from the Federal Aviation Administration as to whether the antenna proposed by the applicant(s) below would constitute a hazard to air navigation, an issue with respect thereto will be included and the F.A.A. made a party to the proceeding.

APPLICANT(S): Davis

17. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

18. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

ISSUES

Main Studio

Applicable	Inapplicable
[ ]	[X]

To determine, pursuant to Section 73.1125, whether good cause exists for the proposed location of its main studio outside the community of license by the following applicant(s):

City Coverage

Applicable	Inapplicable
[X]	[ ]

1. To determine whether the proposal of the following applicant(s) would provide coverage of the city sought to be served, as required by Section 73.315(a) of the Commission's Rules, and, if not, whether circumstances exist which warrant waiver of that Section: Davis, Gardner

Financial Qualifications

Applicable	Inapplicable
[ ]	[X]

To determine with respect to the following applicant(s) whether, in light of the evidence adduced concerning the deficiency set forth above in paragraph 8, the applicant(s) is financially qualified:

Air Hazard

Applicable	Inapplicable
[X]	[ ]

To determine whether there is a reasonable possibility that the tower height and location proposed by the following applicant(s) would constitute a hazard to air navigation: Davis

307(b)

Applicable	Inapplicable
[ ]	[X]

To determine: (a) the areas and populations which would receive primary aural service (1 mV/m or greater in the case of FM) from the proposals and the availability of other primary service to such areas and populations, and (b) in light thereof and pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service.

Contingent Comparative

Applicable	Inapplicable
[ ]	[X]

To determine, in the event it is concluded that choice between the applications should not be based solely on considerations relating to Section 307(b), which of the proposals would, on a comparative basis, best serve the public interest.

Comparative

Applicable	Inapplicable
[X]	[ ]

3. To determine which of the proposals would, on comparative basis, best serve the public interest.

Ultimate

Applicable	Inapplicable
[X]	[ ]

4. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

ORDERING CLAUSES

Legal Notice

Applicable	Inapplicable
[ ]	[X]

19. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, the following applicant(s) shall inform the presiding Administrative Law Judge as to whether local notice of filing of the application has been published:

Applicable	Inapplicable
[ ]	[X]

20. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, the following applicant(s) shall inform the presiding Administrative Law Judge as to whether a corrected local notice of the filing of the application has been republished:

Main Studio Justification

Applicable	Inapplicable
[X]	[ ]

21. IT IS FURTHER ORDERED, That the following applicant(s) shall file with the presiding Administrative Law Judge, within 30 days of the release of this Order, an amended response to Item 12, Section V-B, Form 301, and, if appropriate, a showing of good cause if its respective main studio will be located outside the city of license:
Harrison

City Coverage Waiver

Applicable	Inapplicable
[ ]	[X]

22. IT IS FURTHER ORDERED, That, as to the following applicant(s), the provisions of Section 73.315(a) ARE WAIVED to permit a signal level of less than 3.16 mV/m over the entire city of license:

Financial Qualifications

Applicable	Inapplicable
[ ]	[X]

23. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, the following applicant(s) shall submit the financial certification required by Section III, Form 301, or advise the presiding Administrative Law Judge that the required certification cannot be made:

Programming Statement

Applicable	Inapplicable
[ ]	[X]

24. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, the following applicant(s) shall file an amendment with the presiding Administrative Law Judge describing its planned programming service relating to the issues of public concern facing its proposed service area:
Charleston

E.E.O.

Applicable	Inapplicable
[X]	[ ]

25. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, the following applicant(s) shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge:
Gardner

Late Filed Amendments

Applicable	Inapplicable
[ ]	[X]

26. IT IS FURTHER ORDERED, That the petition for leave to amend filed by the following applicant(s) IS GRANTED, and the corresponding amendment(s) IS ACCEPTED to the extent indicated herein:

Air Hazard

Applicable	Inapplicable
[X]	[ ]

27. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

28. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

29. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

30. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Appendix

Additional Opinion Paragraphs

31. *Harrison.* Pursuant to Section 73.315(a) of the Commission's Rules and Section V-B, Item 11 of its application, Harrison indicates that its proposed 3.16 mV/m contour would completely encompass the principal community of Galveston, without major terrain obstruction. However, Harrison's contour map provided as a supplementary engineering exhibit shows that the 3.16 mV/m contour does *not* completely encompass the principal community. No waiver of Section 73.315(a) has been requested by Harrison. In order to resolve this discrepancy and determine the necessity of a waiver, within 30 days of the release of this Order, Harrison will be required to file, with the presiding Administrative Law Judge, an amendment containing a map correctly delineating the legal boundaries of Galveston, showing the coverage of its 3.16 mV/m contour, and, if necessary, requesting an appropriate waiver. Upon receipt of this data, the Judge may determine whether an issue should be specified or whether a waiver of Section 73.315(a) would be in the public interest.

Additional Ordering Paragraph

32. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Harrison shall file with the presiding Administrative Law Judge a coverage map correctly delineating the legal boundaries of Galveston, Texas and showing the coverage of its 3.16 mV/m contour.

FOOTNOTE

[1] G & S Broadcasting (BPH-841113MF) dismissed by Commission letter dated March 13, 1986. Ogden Broadcasting of Florida, Inc. (BPH-841114MM) dismissed by Commission letter dated June 13, 1985. Galveston Radio, Inc. (BPH-841114NE) dismissed by Commission letter dated March 7, 1986.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 78-196

In the Matter of

Revision of the Uniform System of Accounts and Financial Reporting Requirements for Class A and Class B Telephone Companies (Parts 31, 33, 42, and 43 of the FCC's Rules)

FURTHER ERRATUM

Released: October 31, 1986

Part 32 of the Commission's Rules, Uniform System of Accounts for Telecommunications Companies (USOA), adopted May 1, 1986, in the *Report and Order* in the above entitled proceeding (FCC 86-221), released May 15, 1986, did not conform with the Federal Register numbering convention. The following corrections to the General Instructions of the USOA are necessary to conform Part 32 to that convention:

Page	Section	Description
8	32.01(10)(c)	These paragraphs are deleted.
	32.01(10)(d)	" "
	32.01(10)(e)	" "
	32.01(10)(f)	" "
9	32.01(10)(g)	This paragraph shall be renumbered as 32.01(10)(c).
9	32.01(10)(h)	This paragraph shall be renumbered as 32.01(10)(d).

Because Part 32 was not published in the Federal Register, the list of corrections also will not be published separately but will be incorporated in Part 32 at such time that it is published. Copies of this release may be obtained from the Commission's contractor for public records duplication, International Transcription Services, Inc., Suite 140, 2100 M Street, N.W., Washington, D.C., 20037 at (202) 296-7322. The contractor maintains space in Room 246 at FCC Headquarters, 1919 M Street, N.W., Washington, D.C. 20554.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

MM Docket No. 86-408

ED VER SCHURE COMMUNICATIONS, INC.
(hereafter Ver Schure)
Saugatuck, Michigan
Req: 92.7 MHz, Channel 224A
2.16 kW (H & V), 118 meters — File No. BPH-841120MB

JAMES J. McCLUSKEY
(hereafter McCluskey)
Saugatuck, Michigan
Req: 92.7 MHz, Channel 224A
3 kW (H & V), 100 meters — File No. BPH-850118MA

JAMES PHILLIPS AND COLLEEN PHILLIPS
(hereafter Phillips)
Saugatuck, Michigan
Req: 92.7 MHz, Channel 224A
3 kW (H & V), 72 meters — File No. BPH-850124MF

DUNES BROADCASTING, INC.
(hereafter Dunes)
Saugatuck, Michigan
Req: 92.7 MHz, Channel 224A
3 kW (H & V), 96 meters — File No. BPH-850228MH (DISMISSED)

For Construction Permit
for a New FM Station

HEARING DESIGNATION ORDER

Adopted: October 16, 1986 **Released: October 31, 1986**

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. In the interest of administrative efficiency and resource economy, portions of this Order have been standardized. Consequently, opinion paragraphs, issues and ordering clauses will only apply where an "X" appears in an appropriate box. If the paragraph is directed to some, but not all, of the captioned applicants, those affected will be specified. In addition, non-standardized text in this Order, if any, will be set forth in an Appendix.

OPINION PARAGRAPHS

Local Notice

Applicable	Inapplicable
[ ]	[X]

3. Applicants for new broadcast stations are required by Section 73.3580 of the Commission's Rules to give local notice of the filing of their applications. We have no indication that the applicant(s) below published the required notice. To remedy this deficiency, the applicant(s) must publish local notice of the application, if it has not already done so, and so inform the presiding Administrative Law Judge within 30 days of the release of this Order, or an appropriate issue will be specified by the Judge.

APPLICANT(S):

Applicable	Inapplicable
[ ]	[X]

4. Applicants for new broadcast stations are required by Section 73.3580 of the Commission's Rules to give local notice of the filing of their applications. The applicant(s) below has published the required notice, but the notice is deficient. To remedy this deficiency, the applicant(s) must republish an amended local notice of the application, if it has not already done so, and so inform the presiding Administrative Law Judge within 30 days of the release of this Order, or an appropriate issue will be specified by the Judge.

APPLICANT (S) DEFICIENCY

Main Studio Justification

Applicable	Inapplicable
[ ]	[X]

5. Section 73.1125 of the Commission's Rules requires that the main studio of an FM station be located within the city of license, but that on a showing of good cause may be located outside that community. The applicant(s) below proposes to locate its main studio outside that community and gives the following justification(s):

APPLICANT(S) LOCATION(S) JUSTIFICATION(S)

(a) good cause has been shown by the following applicant(s) for the proposed main studio location:

(b) good cause has not been shown by the following applicant(s) and, accordingly, an issue will be specified.

Applicable	Inapplicable
[ ]	[X]

6. Section 73.1125 of the Commission's rules requires that the main studio of an FM station be located within the city of license, but that on a showing of good cause may be located outside that community. The applicant(s) below states in its response to Item 12, Section V-B, Form 301, that its main studio will be at a location to be determined, with no indication that the determination would be limited to sites within the city of license. Under these circumstances, the applicant(s) will be required to file with the presiding Administrative Law Judge, within 30 days of the release of this Order, either an amended response to the above-referenced item and/or, if applicable, a showing of good cause should it propose to locate its main studio outside the city of license, or an appropriate issue will be specified by the Judge.

APPLICANT (S):

City Coverage Waiver

Applicable	Inapplicable
[ ]	[X]

7. The engineering data submitted by the applicant(s) below does not clearly demonstrate that it provides a 3.16 mV/m signal to the entire proposed city of license, as required by Section 73.315(a) of the Commission Rules:

APPLICANT (S) WAIVER JUSTIFICATION (S)

(a) The following applicant(s) has submitted facts and circumstances which persuade us that grant of a waiver of Section 73.315(a) would be in the public interest:

(b) The following applicant(s) has not shown circumstances which warrant a waiver of 73.315(a) and, accordingly, an issue will be specified:

(c) The following applicant(s) has not requested a waiver of 73.315(a) and, accordingly, an issue will be specified:

Financial Qualifications

Applicable	Inapplicable
[ ]	[X]

8. The material submitted by the applicant(s) below does not demonstrate its financial qualifications. Accordingly, an issue will be specified concerning the following deficiency:

APPLICANT (S) DEFICIENCY

Applicable	Inapplicable
[ ]	[X]

9. The applicant(s) below has certified as to its financial qualifications. The certification, however, does not substantially meet the certification set out in revised Section III, Form 301. Accordingly, the applicant(s) will be given 30 days from the release of this Order to submit to the presiding Administrative Law Judge the certification required by the form or to advise the Judge that it cannot make the required certification. In the latter event, the Judge shall specify an appropriate issue.

APPLICANT (S):

Programming Statement

Applicable	Inapplicable
[ ]	[X]

10. The applicant(s) below has not submitted a description in narrative form of proposed programming relating to the issues of public concern facing its service area, pursuant to Paragraph 1, Section IV, Form 301. Accordingly, the applicant(s) will be required to file within 30 days of the release of this Order a narrative programming statement with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

APPLICANT (S):

E.E.O.

Applicable	Inapplicable
[ ]	[X]

11. The material submitted by the applicant(s) below fails to indicate that it will have less than five full-time employees. The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301, and supply a statement detailing hiring and promotion policies even though there may be only a few members of minorities residing within the proposed service area. Accordingly, the applicant(s) will be required to file this Section VI information within 30 days of the release of this Order with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

APPLICANT (S):

Late Filed Amendments

Applicable	Inapplicable
[X]	[ ]

12. The applicant(s) below has petitioned for leave to amend its application on the date(s) shown. The accompanying amendment(s) was(were) filed after the "B" cutoff date, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment(s) is accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment(s) will be disallowed.

APPLICANT (S) DATE AMENDMENT (S) FILED

Phillips February 26, 1986.

Areas & Populations

Applicable	Inapplicable
[X]	[ ]

13. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

Contingent Comparative

Applicable	Inapplicable
[ ]	[X]

14. The respective proposals, although for different communities, would serve substantial areas in common. Consequently, in addition to determining, pursuant to Section 307(b) of the Communications Act of 1934, as

amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service, a contingent comparative issue will also be specified.

Different Communities 307(b)

Applicable	Inapplicable
[ ]	[X]

15. The respective proposals are for different communities. Consequently, it will be necessary to determine pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio services.

Air Hazard

Applicable	Inapplicable
[X]	[ ]

16. Since no determination has been received from the Federal Aviation Administration as to whether the antenna proposed by the applicant(s) below would constitute a hazard to air navigation, an issue with respect thereto will be included and the F.A.A. made a party to the proceeding.

APPLICANT(S): McCluskey

17. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

18. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

ISSUES

Main Studio

Applicable	Inapplicable
[ ]	[X]

To determine, pursuant to Section 73.1125, whether good cause exists for the proposed location of its main studio outside the community of license by the following applicant(s):

City Coverage

Applicable	Inapplicable
[ ]	[X]

1. To determine whether the proposal of the following applicant(s) would provide coverage of the city sought to be served, as required by Section 73.315(a) of the Commission's Rules, and, if not, whether circumstances exist which warrant waiver of that Section:

Financial Qualifications

Applicable	Inapplicable
[ ]	[X]

To determine with respect to the following applicant(s) whether, in light of the evidence adduced concerning the deficiency set forth above in paragraph 8, the applicant(s) is financially qualified:

Air Hazard

Applicable	Inapplicable
[X]	[ ]

To determine whether there is a reasonable possibility that the tower height and location proposed by the following applicant(s) would constitute a hazard to air navigation: (McCluskey)

307(b)

Applicable	Inapplicable
[ ]	[X]

To determine: (a) the areas and populations which would receive primary aural service (1 mV/m or greater in the case of FM) from the proposals and the availability of other primary service to such areas and populations, and (b) in light thereof and pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service.

Contingent Comparative

Applicable	Inapplicable
[ ]	[X]

To determine, in the event it is concluded that choice between the applications should not be based solely on considerations relating to Section 307(b), which of the proposals would, on a comparative basis, best serve the public interest.

Comparative

Applicable	Inapplicable
[X]	[ ]

3. To determine which of the proposals would, on comparative basis, best serve the public interest.

Ultimate

Applicable	Inapplicable
[X]	[ ]

4. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

ORDERING CLAUSES

Legal Notice

Applicable	Inapplicable
[ ]	[X]

19. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, the following applicant(s) shall inform the presiding Administrative Law Judge as to whether local notice of filing of the application has been published:

Applicable	Inapplicable
[ ]	[X]

20. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, the following applicant(s) shall inform the presiding Administrative Law Judge as to whether a corrected local notice of the filing of the application has been republished:

Main Studio Justification

Applicable	Inapplicable
[ ]	[X]

21. IT IS FURTHER ORDERED, That the following applicant(s) shall file with the presiding Administrative Law Judge, within 30 days of the release of this Order, an amended response to Item 12, Section V-B, Form 301, and, if appropriate, a showing of good cause if its respective main studio will be located outside the city of license:

City Coverage Waiver

Applicable	Inapplicable
[ ]	[X]

22. IT IS FURTHER ORDERED, That, as to the following applicant(s), the provisions of Section 73.315(a) ARE WAIVED to permit a signal level of less than 3.16 mV/m over the entire city of license:

Financial Qualifications

Applicable	Inapplicable
[ ]	[X]

23. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, the following applicant(s) shall submit the financial certification required by Section III, Form 301, or advise the presiding Administrative Law Judge that the required certification cannot be made:

Programming Statement

Applicable	Inapplicable
[ ]	[X]

24. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, the following applicant(s) shall file an amendment with the presiding Administrative Law Judge describing its planned programming service relating to the issues of public concern facing its proposed service area:

E.E.O.

Applicable	Inapplicable
[ ]	[X]

25. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, the following applicant(s) shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge:

Late Filed Amendments

Applicable	Inapplicable
[X]	[ ]

26. IT IS FURTHER ORDERED, That the petition for leave to amend filed by the following applicant(s) IS GRANTED, and the corresponding amendment(s) IS ACCEPTED to the extent indicated herein: Phillips

Air Hazard

Applicable	Inapplicable
[X]	[ ]

27. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

28. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

29. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

30. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

APPENDIX

Additional Opinion Paragraphs

31. *Phillips*. On June 3, 1985, Phillips submitted an amendment updating Section II, Item 5(a) of FCC Form 301 to add his wife, Colleen Phillips, as a 49 percent general partner. Mr. Phillips retains 51% own- ership as a general partner. However, Phillips failed to provide the in- formation required in Section II, Items 1-5, as to Mrs. Phillips's legal qualifications. Accordingly, Phillips will be required to file this information with the presiding Administrative Law Judge within 30 days of the release of this Order.

32. *Dunes*. On October 25, 1985, Dunes amended its application to specify a new transmitter site in Ganges, Michigan. Dunes's amendment included a statement that the proposed 1 mV/m contour would overlap with that of WCSY-FM, Spartan Broadcasting, South Haven, Michigan. As Dunes had reported in its tendered application, WCSY is wholly owned by Donald L. Anderson, husband of Dunes principal Arlene Anderson. In addition, Mrs. Anderson has been Vice President and Treasurer of WCSY-FM since April 20, 1981. Section 73.3555(a)(2), in pertinent part, states that no license for an FM broadcast station shall be granted to any party if such party directly or indirectly owns, operates or controls one or more broadcast stations in the same service and grant of such license will result in an overlap of the predicted 1 mV/m contours of the existing and proposed FM stations. Dunes claims that such overlap does not violate § 73.3555(a)(2) since steps will be taken to insulate Mr. Anderson and Mrs. Anderson from each other's interests.

33. On October 25, 1985, a petition to dismiss Dunes's application was filed on behalf of Ed Ver Schure Communications, Inc. ("Ver Schure"). In response, Dunes filed its opposition on November 8 with Ver Schure replying on November 18th. Ver Schure's petition alleged that the acknowledged overlap violates § 73.3555(a)(2), and Dunes's application therefore "should be returned as unacceptable for filing or otherwise returned." In its opposition, Dunes countered by claiming that Ver Schure's pleading constituted an untimely filed petition for reconsideration of the Commission's September 18, 1985 acceptance of its application. Further, Dunes argued that no waiver of § 73.3555(a)(2) was needed since "the normal presumption of spousal attribu- tion has been rebutted in the case of Dunes principal Arlene Anderson" by virtue of the proposed post-nuptial agreement "fashioned to conform" with the agreement approved in *Lady Sarah McKinney - Smith*, 59 FCC 2d 398 (1976).

34. Commission policy states that a common interest can reasonably be presumed to exist between husband and wife, and that the broadcast interests of one must be attributed to the other. *Alexander S .Klein*, 86 FCC 2d 423, 425-27 (1981). In *McKinney - Smith*, the Commission held that this presumption was rebutted by the novel circumstances (the widow and executrix of an AM facility "falling-in-love" with the owner of an overlapping facility) and a pre-nuptial agreement successfully insulating the broadcast interests of the parties involved. With spousal attribution rebutted, the Commission waived the AM "duopoly" rules for the life of the marriage. In contrast, the evidence in this proceeeding fails to rebut the spousal attribution. Specifically, the Andersons have worked together in the control of WCSY since 1981 and their proposed post-nuptial agreement does not insulate either party from providing or receiving financial aid from the other. In failing to satisfy these prerequisites for rebuttal of spousal attribution, Dunes has not provided sufficient justification for waiver of our multiple ownership rules. Accordingly, Dunes's application is in patent violation of § 73.3555(a)(2) and its application must therefore be dismissed. Since this action is based on normal Commission processing, no further consideration need be given Ver Schure's pleading and it, as well as all responsive pleadings, will be dismissed as moot.

Additional Ordering Paragraphs

35. IT IS FURTHER ORDERED, That Phillips is required to submit an amended response to Section II, Items 1-5 of FCC Form 301, clarifying the legal qualifications of its new partner, to the presiding Administrative Law Judge within 30 days of the release of this Order.

36. IT IS FURTHER ORDERED, That the application filed by Dunes IS DISMISSED as inadvertently accepted for filing, and the petition filed by Ver Schure and related pleadings ARE DISMISSED as moot.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

MM Docket No. 86-407

BOTT COMMUNICATIONS, INC. File No. BPH-850314MA
(hereafter Bott)
Ukiah, California
Req: 105.9 MHz, Channel 290B
2.8 kW (H & V), 554 meters

CLAUDIA CLARKE AND THEODORE S. STORCK, d/b/a REDWOOD EMPIRE BROADCASTING File No. BPH-850529MB
(hereafter Redwood)
Ukiah, California
Req: 105.9 MHz, Channel 290B
2.8 kW (H & V), 545 meters

JOSEPH M. PEREZ File No. BPH-850529MD
(hereafter Perez)
Ukiah California
Req: 105.9 MHz, Channel 290B
2.5 kW (H & V), 573 meters

MARILYN J. JOHNSON File No. BPH-850531MB
(hereafter Johnson)
Ukiah, California
Req: 105.9 MHz, Channel 290B
2.5 kW (H & V), 570 meters

SOUND SENSE, A CALIFORNIA LIMITED PARTNERSHIP File No. BPH-850531MK
(hereafter Sound Sense)
Ukiah, California
Req: 105.9 MHz, Channel 290B
2.95 kW (H & V), 562 meters

For Construction Permit
for a New FM Station

HEARING DESIGNATION ORDER

Adopted: October 16, 1986 **Released: October 31, 1986**

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. In the interest of administrative efficiency and resource economy, portions of this Order have been standardized. Consequently, opinion paragraphs, issues and ordering clauses will only apply where an "X" appears in an appropriate box. If the paragraph is directed to some, but not all, of the captioned applicants, those affected will be specified. In addition, non-standardized text in this Order, if any, will be set forth in an Appendix.

OPINION PARAGRAPHS

Local Notice

Applicable	Inapplicable
[ ]	[X]

3. Applicants for new broadcast stations are required by Section 73.3580 of the Commission's Rules to give local notice of the filing of their applications. We have no indication that the applicant(s) below published the required notice. To remedy this deficiency, the applicant(s) must publish local notice of the application, if it has not already done so, and so inform the presiding Administrative Law Judge within 30 days of the release of this Order, or an appropriate issue will be specified by the Judge.

APPLICANT(S):

Applicable	Inapplicable
[ ]	[X]

4. Applicants for new broadcast stations are required by Section 73.3580 of the Commission's Rules to give local notice of the filing of their applications. The applicant(s) below has published the required notice, but the notice is deficient. To remedy this deficiency, the applicant(s) must republish an amended local notice of the application, if it has not already done so, and so inform the presiding Administrative Law Judge within 30 days of the release of this Order, or an appropriate issue will be specified by the Judge.

APPLICANT (S) DEFICIENCY

Main Studio Justification

Applicable	Inapplicable
[ ]	[X]

5. Section 73.1125 of the Commission's Rules requires that the main studio of an FM station be located within the city of license, but that on a showing of good cause may be located outside that community. The applicant(s) below proposes to locate its main studio outside that community and gives the following justification(s):

APPLICANT(S) LOCATION(S) JUSTIFICATION(S)

(a) good cause has been shown by the following applicant(s) for the proposed main studio location:

(b) good cause has not been shown by the following applicant(s) and, accordingly, an issue will be specified.

Applicable	Inapplicable
[ ]	[X]

6. Section 73.1125 of the Commission's rules requires that the main studio of an FM station be located within the city of license, but that on a showing of good cause may be located outside that community. The applicant(s) below states in its response to Item 12, Section V-B, Form 301, that its main studio will be at a location to be determined, with no indication that the determination would be limited to sites within the city of license. Under

these circumstances, the applicant(s) will be required to file with the presiding Administrative Law Judge, within 30 days of the release of this Order, either an amended response to the above-referenced item and/or, if applicable, a showing of good cause should it propose to locate its main studio outside the city of license, or an appropriate issue will be specified by the Judge.
APPLICANT (S):

City Coverage Waiver

Applicable	Inapplicable
[ ]	[X]

7. The engineering data submitted by the applicant(s) below does not clearly demonstrate that it provides a 3.16 mV/m signal to the entire proposed city of license, as required by Section 73.315(a) of the Commission Rules:
APPLICANT (S) WAIVER JUSTIFICATION (S)

(a) The following applicant(s) has submitted facts and circumstances which persuade us that grant of a waiver of Section 73.315(a) would be in the public interest:

(b) The following applicant(s) has not shown circumstances which warrant a waiver of 73.315(a) and, accordingly, an issue will be specified:

(c) The following applicant(s) has not requested a waiver of 73.315(a) and, accordingly, an issue will be specified:

Financial Qualifications

Applicable	Inapplicable
[ ]	[X]

8. The material submitted by the applicant(s) below does not demonstrate its financial qualifications. Accordingly, an issue will be specified concerning the following deficiency:
APPLICANT (S) DEFICIENCY

Applicable	Inapplicable
[ ]	[X]

9. The applicant(s) below has certified as to its financial qualifications. The certification, however, does not substantially meet the certification set out in revised Section III, Form 301. Accordingly, the applicant(s) will be given 30 days from the release of this Order to submit to the presiding Administrative Law Judge the certification required by the form or to advise the Judge that it cannot make the required certification. In the latter event, the Judge shall specify an appropriate issue.
APPLICANT (S):

Programming Statement

Applicable	Inapplicable
[ ]	[X]

10. The applicant(s) below has not submitted a description in narrative form of proposed programming relating to the issues of public concern facing its service area, pursuant to Paragraph 1, Section IV, Form 301. Accordingly, the applicant(s) will be required to file within 30 days of the release of this Order a narrative programming statement with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.
APPLICANT (S):

E.E.O.

Applicable	Inapplicable
[ ]	[X]

11. The material submitted by the applicant(s) below fails to indicate that it will have less than five full-time employees. The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301, and supply a statement detailing hiring and promotion policies even though there may be only a few members of minorities residing within the proposed service area. Accordingly, the applicant(s) will be required to file this Section VI information within 30 days of the release of this Order with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.
APPLICANT (S):

Late Filed Amendments

Applicable	Inapplicable
[X]	[ ]

12. The applicant(s) below has petitioned for leave to amend its application on the date(s) shown. The accompanying amendment(s) was(were) filed after the "B" cut-off date, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment(s) is accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment(s) will be disallowed.

APPLICANT(S)	DATE AMENDMENT(S) FILED
Bott	March 12, 1986
Sound Sense	June 6, 1986

Areas & Populations

Applicable	Inapplicable
[X]	[ ]

13. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, to-

gether with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

Contingent Comparative

Applicable	Inapplicable
[ ]	[X]

14. The respective proposals, although for different communities, would serve substantial areas in common. Consequently, in addition to determining, pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service, a contingent comparative issue will also be specified.

Different Communities 307(b)

Applicable	Inapplicable
[ ]	[X]

15. The respective proposals are for different communities. Consequently, it will be necessary to determine pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio services.

Air Hazard

Applicable	Inapplicable
[X]	[ ]

16. Since no determination has been received from the Federal Aviation Administration as to whether the antenna proposed by the applicant(s) below would constitute a hazard to air navigation, an issue with respect thereto will be included and the F.A.A. made a party to the proceeding.

APPLICANT(S): Bott, Redwood, Perez, Johnson, Sound Sense

17. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

18. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

ISSUES

Main Studio

Applicable	Inapplicable
[ ]	[X]

To determine, pursuant to Section 73.1125, whether good cause exists for the proposed location of its main studio outside the community of license by the following applicant(s):

City Coverage

Applicable	Inapplicable
[ ]	[X]

1. To determine whether the proposal of the following applicant(s) would provide coverage of the city sought to be served, as required by Section 73.315(a) of the Commission's Rules, and, if not, whether circumstances exist which warrant waiver of that Section:

Financial Qualifications

Applicable	Inapplicable
[ ]	[X]

To determine with respect to the following applicant(s) whether, in light of the evidence adduced concerning the deficiency set forth above in paragraph 8, the applicant(s) is financially qualified:

Air Hazard

Applicable	Inapplicable
[X]	[ ]

To determine whether there is a reasonable possibility that the tower height and location proposed by the following applicant(s) would constitute a hazard to air navigation: Bott, Redwood, Perez, Johnson, Sound Sense

307(b)

Applicable	Inapplicable
[ ]	[X]

To determine: (a) the areas and populations which would receive primary aural service (1 mV/m or greater in the case of FM) from the proposals and the availability of other primary service to such areas and populations, and (b) in light thereof and pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service.

Contingent Comparative

Applicable	Inapplicable
[ ]	[X]

To determine, in the event it is concluded that choice between the applications should not be based solely on considerations relating to Section 307(b), which of the proposals would, on a comparative basis, best serve the public interest.

Comparative

Applicable	Inapplicable
[X]	[ ]

3. To determine which of the proposals would, on comparative basis, best serve the public interest.

Ultimate

Applicable	Inapplicable
[X]	[ ]

4. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

ORDERING CLAUSES

Legal Notice

Applicable	Inapplicable
[ ]	[X]

19. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, the following applicant(s) shall inform the presiding Administrative Law Judge as to whether local notice of filing of the application has been published:

Applicable	Inapplicable
[ ]	[X]

20. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, the following applicant(s) shall inform the presiding Administrative Law Judge as to whether a corrected local notice of the filing of the application has been republished:

Main Studio Justification

Applicable	Inapplicable
[ ]	[X]

21. IT IS FURTHER ORDERED, That the following applicant(s) shall file with the presiding Administrative Law Judge, within 30 days of the release of this Order, an amended response to Item 12, Section V-B, Form 301, and, if appropriate, a showing of good cause if its respective main studio will be located outside the city of license:

City Coverage Waiver

Applicable	Inapplicable
[ ]	[X]

22. IT IS FURTHER ORDERED, That, as to the following applicant(s), the provisions of Section 73.315(a) ARE WAIVED to permit a signal level of less than 3.16 mV/m over the entire city of license:

Financial Qualifications

Applicable	Inapplicable
[ ]	[X]

23. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, the following applicant(s) shall submit the financial certification required by Section III, Form 301, or advise the presiding Administrative Law Judge that the required certification cannot be made:

Programming Statement

Applicable	Inapplicable
[ ]	[X]

24. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, the following applicant(s) shall file an amendment with the presiding Administrative Law Judge describing its planned programming service relating to the issues of public concern facing its proposed service area:

E.E.O.

Applicable	Inapplicable
[ ]	[X]

25. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, the following applicant(s) shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge:

Late Filed Amendments

Applicable	Inapplicable
[X]	[ ]

26. IT IS FURTHER ORDERED, That the petition for leave to amend filed by the following applicant(s) IS GRANTED, and the corresponding amendment(s) IS ACCEPTED to the extent indicated herein: Bott, Sound Sense

Air Hazard

Applicable	Inapplicable
[X]	[ ]

27. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

28. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

29. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

30. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

APPENDIX

Additional Opinion Paragraphs

30. Although all the applicants in this proceeding have proposed to locate their tower at or adjacent to the existing KWNE-FM tower site, both Perez and Redwood have stated that the Ukiah office of the Bureau of Land Management (hereafter "BLM") has informed them that the eventual permittee will be asked to relocate to another site of BLM's choosing on Cow Mountain. This information was confirmed in a conversation with an employee at the Ukiah BLM on August 12, 1986. The employee stated that the proposed new site would be located approximately 450 feet from the existing KWNE-FM tower-site. We were also informed that there has been a delay in finalizing the proposed new site due to a "right-of-way" dispute that should be resolved shortly with the site to be made available on or about December 15, 1986. Consequently, in the event of a change in the proposed tower location, Bott, Redwood, Perez, Johnson, and Sound Sense are reminded that they will be required to file with the presiding Administrative Law Judge an amended Section V-B and V-G, Form 301, within 30 days of notification to these parties of the approval and finalization of the proposed new site.[1]

31. A "Petition to Dismiss and Deny Application For Construction Permit and Amendments Thereto Filed By Sound Sense" (hereafter "Petition") was filed on September 13, 1985 by Marilyn J. Johnson, an applicant in this proceeding. The Petition alleged that the Sound Sense application should be dismissed because it was "fundamentally defective and unacceptable" at the time of filing because the applicant answered "No" to Item 3(a) of Section II, Form 301, as to whether Ms. Vidya Tolani, the sole shareholder of the applicant, complied with the alien ownership provision of Section 310 of the Communications Act of 1934, as amended. In addition, the Petition alleged that the "B" cut-off date was May 31, 1985 and that Sound Sense had attempted to improve its comparative status after this cut-off date by specifying the installation of an auxiliary generator in an amendment dated August 15, 1985 and had attempted to correct a patently unacceptable application through an amendment, dated September 11, 1985, stating that Ms. Tolani had been naturalized as a United States citizen on September 3, 1985.

32. Sound Sense notes correctly in its September 25, 1985 Response that the "B" cut-off date was in fact October 25, 1985, not May 31, 1985 as alleged in the Petition. The May 31, 1985 date was merely the "A" cut-off date for submission of mutually exclusive applications. Further, Sound Sense explains that its "No" answer to Item 3(a), Form 301, was in reality a "qualified affirmative answer" because an exhibit had been attached stating that Ms. Tolani had applied for U.S. citizenship, taken all tests, prepared all documents, and completed the required interview. A delay in her swearing in had been occasioned by a "mix-up in the files." The formal swearing in had in fact taken place on September 3, 1985, before the "B" cut-off date, October 25, 1985. Sound Sense also argues that its August 15, 1985 amendment specifying the installation of an auxiliary generator was not filed to improve its comparative position. Once again, we note that this amendment was clearly filed before the October 25, 1985 cut-off date.

33. It is well established that alien ownership is a basic qualifying issue. *See Washington's Christian Television Outreach , Inc .*, 99 FCC 2d 395, 407 (1984). While competing parties do take part in litigation over such issues, those applicants "have no vested right to bar an application amendment which would remove a basic disqualifying hurdle from a competitor's path; that is a procedural prerogative of the Commission." *Washington ' s Christian Television Outreach , Inc .*, 99 FCC 2d 395, 407 (1984). *See also Azalea Corp .*, 31 FCC 2d 561, 563 (1971). We have also noted that, in applying our procedural rules, "the underlying purposes of those rules is to ensure that rigidity does not override those purposes, justice, or equity." *Son Broadcasting Inc .*, 92 FCC 2d 450, 452 (1982).

34. Consequently we conclude, based on the evidence before us, that Sound Sense did not violate the letter and spirit of the alien ownership provisions. The applicant did respond to the certification of compliance in Item 3(a), Form 301. Although the question was answered "No", we believe that this response was properly qualified by the attached exhibit indicating that Ms. Tolani had previously completed all requirements for U.S. citizenship. The exhibit indicated that there had merely been a delay in her swearing in due to a "mix-up in the files." Further, the applicant kept us apprised of the status of Ms. Tolani's petition for naturalization in an amendment dated August 15, 1985 and informed us, in a September 11, 1985 amendment, that she had been sworn in on September 3, 1985 in the District Court of the Northern District of California. Once again, we note that this "curative" amendment was filed well before the "B" cut-off date of October 25, 1985 and we conclude that the amendment is acceptable. *See also Metromedia Radio & Television Inc .*,

102 FCC 2d 1334, 1341 (1985). This rationale is also applicable to the August 15, 1985 amendment specifying the installation of an auxiliary generator which was timely filed as a matter of right prior to the "B" cut-off date pursuant to 47 C.F.R. Section 73.3522(a)(2). Consequently, we will deny the Petition.

Additional Ordering Clause

36. IT IS FURTHER ORDERED, That the petition to dismiss and deny application filed by Marilyn J. Johnson IS DENIED.

FOOTNOTES

[1] In answering Questions 16 of Section V-B, the applicants will be required to comply with the newly revised environmental criteria set forth in the *Report and Order* in GEN Docket No. 79-163, 51 Fed Red. 14999 (1986). Under the newly revised rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in the newly added Section 1.1307 of the Commission's Rules. If the applications are subject to environmental processing under the Section 1.1307 criteria, the applicants must then submit an Environmental Assessment (EA) containing the information delineated in the newly revised Section 1.1311 of the Commission's Rules. The applicants should be aware that all of their currently proposed antenna heights located in close proximity to other antennae pose possible radiation hazard problems. We are unable at this time to determine whether a proposed new site would require the applicants' submission of assessments, but the applicants are reminded of their obligation for making such a determination and submitting an EA if such a document proves to be necessary. In addition, we are uncertain as to whether any proposed new site will constitute a hazard to air navigation. Accordingly, we will expect the applicants to obtain the necessary clearance if a new site is specified.

Before the
Federal Communications Commission
Washington, D.C. 20554

Transmittal No. 7
CC Docket No. 86-193

In the Matter of

CENTEL TELEPHONE COMPANIES

Revisions to Tariff F.C.C. No. 1

ORDER

Adopted: October 17, 1986; Released: October 30, 1986

By the Chief, Common Carrier Bureau:

1. In an earlier Order in this docket, we designated issues for investigation of the captioned proposed tariff revisions.[1] Subsequent to release of the *Designation Order*, Centel withdrew the captioned revisions.[2] The issues designated for investigation are therefore moot.

2. Accordingly, IT IS ORDERED that the investigation instituted in CC Docket No. 86-193 IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Albert Halprin
Chief, Common Carrier Bureau

FOOTNOTES

[1] Centel Telephone Companies, Transmittal No. 7, Mimeo No. 4479, released May 14, 1986 (*Designation Order*).

[2] Application for Special Permission No. 21, filed May 20, 1986. This application was granted by letter from the Chief, Tariff Division, to Mr. Ronald W. Barkby, dated May 23, 1986.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

HAWAIIAN TELEPHONE CO. File No. I-T-C-86-172

Application for authority to acquire and operate facilities for direct service to Western Samoa

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: October 20, 1986 Released: October 30, 1986

By the Common Carrier Bureau:

1. The captioned uncontested application, filed on August 29, 1986 by Hawaiian Telephone Co. (HTC), requests authority to lease and operate satellite facilities for direct service to Western Samoa. Upon consideration of the application, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service to Western Samoa by HTC.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-86-172 IS GRANTED, and HTC is authorized to:

a. lease and operate three satellite voice circuits between an appropriate earth station in Hawaii and an appropriate satellite over the Pacific Ocean, connecting with similar circuits between the satellite and an earth station in Western Samoa furnished by HTC's correspondent in Western Samoa; and

b. use said facilities to provide HTC's regularly authorized services between Hawaii and Western Samoa and beyond.

3. The authority granted herein is conditioned on compliance by HTC and its affiliates with Commission policies on uniform settlement rates and exclusive service, facility and traffic arrangements.

4. HTC's blanket authorization for satellite facilities between Hawaii and Pacific points, released August 30, 1983 (File No. I-P-C-83-064) is hereby modified to include Western Samoa.

5. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to insure nondiscriminatory use of, and equitable access to, the communications satellite system.

6. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between HTC and its correspondent in Western Samoa, and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

7. This authorization is effective on its release date and shall be continued year-to-year, unless the Commission notifies the applicant to the contrary and requires a new application to be filed. If the Commission requires a new application to be filed, the authorization will continue in effect until Commission action on the application.

8. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

James L. Ball
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH CO.

Application for authority to acquire and operate two Digital Trunk Expander Terminals for service to Ireland	File No. I-T-C-86-165
Application for authority to acquire and operate one Digital Trunk Expander Terminal for service to Japan	File No. I-T-C-86-171

ORDER AND AUTHORIZATION

Adopted: October 20, 1986 **Released: October 30, 1986**

By the Common Carrier Bureau:

1. The captioned uncontested applications, filed on August 22, and 28, 1986, respectively, by American Telephone and Telegraph Co. (AT&T), request authority to acquire and operate circuit multiplication equipment for regularly authorized services between the U.S., on the one hand, and Ireland and Japan, on the other hand. Upon consideration of the applications, we find that authorization of the requested facilities and services is required by the public convenience and necessity.

2. Accordingly, IT IS ORDERED that application File Nos. I-T-C-86-165 and I-T-C-86-171 ARE GRANTED, and AT&T is authorized to: a. acquire and install two Digital Trunk Expander Terminals and operate these facilities, in conjunction with facilities furnished by its correspondent in Ireland, to provide AT&T's regularly authorized services between the U.S. and Ireland and beyond; and b. acquire and install one Digital Trunk Expander Terminal and operate these facilities, in conjunction with facilities furnished by its correspondent in Japan, to provide AT&T's regularly authorized services between the U.S. and Japan and beyond.

3. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

James L. Ball
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM DOCKET NO. 86-171

DON TOMAS MOORE	File No. BPCT-851231KE
Rochon Dibble d/b/a SKY HIGH TELECOMMUNICATIONS COMPANY, LTD.	File No. BPCT-860212KN
HIGH SEAS COMMUNICATIONS, LTD.	File No. BPCT-860212KP
BRASSELL & ROMERO	File No. BPCT-860212LG
George S. Flinn, Jr. and Jimmy C. Cowsert d/b/a MOUNTAIN STATES TELECASTERS	BPCT-860212LH

For Construction Permit
for New TV Station
Denver, Colorado

Appearances

William Crispin and *Michael Wilhelm* on behalf of Don Tomas Moore; *Thomas Hart*, *Henry Hoberman* and *Ken Howard* on behalf of Rochon Dibble d/b/a Sky High Telecommunications Company, Ltd.; *Thomas Hendrickson*, *James Ireland*, and *Marsha MacBride* on behalf of High Seas Communications Corp.; *Ernest Sanchez* and *Ken Kensinger* on behalf of Brassell and Romero; *Jeffrey D. Southmayd* and *Stephen C. Simpson* on behalf of Mountain States Telecasters; and *Norman Goldstein* on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

SUMMARY DECISION OF ADMINISTRATIVE LAW JUDGE

WALTER C. MILLER

Issued: October 9, 1986; Released: October 30, 1986

1. The five applicants have submitted a settlement package that could terminate this proceeding. It consists of: (1) a Joint Motion for Approval of Agreement along with the accompanying affidavits and Memorandum of Settlement filed by the applicants on October 3, 1986; (2) an interrelated Motion for Leave to Amend filed by High Seas Communications Corp. on October 3, 1986; [1] and (3) a Motion for Summary Decision that High Seas Communications Corp. filed on its own behalf and as a general partner of the Denver Channel 59 Partnership, Ltd. on October 3, 1986. [1] The Mass Media Bureau supported the acceptance of High Seas' amended engineering on October 8, 1986. Thus it agrees that the 73.685(e) waiver issue can be resolved in High Seas' favor.

2. The applicants have settled their differences. Don Tomas Moore will dismiss his application. In return High Seas will pay Moore $150,000. Sky High will dismiss its application, and in return High Seas will pay Sky High $150,000. Brassell and Romero will dismiss their application. In return High Seas will pay them $50,000, and Mountain States will pay them $5,000. [2]

3. The two remaining applicants, High Seas and Mountain States, will then merge into a limited partnership called the Denver Channel 59 Partnership, Ltd.; Mountain States will dismiss BPCT-860212LH, while High Seas will amend and perfect BPCT-860212KP, and prosecute that application through to grant. To that end High Seas has filed both a Motion for Leave to Amend and a Motion for Summary Decision.

4. The merged limited partnership, Denver Channel 59 Partnership, Ltd. will be structured as follows:

(a) High Seas Communications is the sole general partner and owns 20% of the partnership equity;
(b) Charles Ergen (of High Seas) holds a 70% limited partnership interest; and
(c) George S. Flinn, Jr. and Jimmy Cowsert d/b/a Mountain States Telecasters holds a 10% limited partnership interest.

High Seas' Motion for Leave to Amend

5. High Seas wants to amend its application to show two things. First it wants to reduce power and reconfigure its directional antenna array. This will permit it to present a technical proposal which no longer violates 47 CFR 73.685(e). Secondly, High Seas wants to amend BPCT-860212KP to change the name of the applicant and to reflect the changed ownership structure described above.

6. The amendment requests will be granted. Good cause exists for accepting the amendment, and such acceptance could pave the way for a satisfactory resolution of this five-applicant conflict. In addition, accepting the engineering portion will permit the primary surviving applicant, High Seas, to address 47 CFR 73.685(e) waiver issue that has been designated against it. See 51 F.R. 22865 published June 23, 1986, at paragraph 4 and Issue 2. [3]

The Joint Motion for Approval of Settlement

7. The Joint Motion will be granted, and the agreement approved. The parties have submitted the appropriate documents. See *Oak Television of Everett, Inc.*, 53 RR 2d 995 (1983). Those documents have been examined. There is no reason to believe that either application was filed for an improper purpose or any reason to believe that the settlement agreement described in paras. 2-3 *supra.*, is inconsistent with the public interest. See *Bison City Television 49 Limited Partnership*, 53 RR 2d 722 (1983).

8. In fact the public interest will be furthered. Since approval of the agreement will permit the expeditious innauguration of this new television service, and conserve the Commission's resources, the public interest will be served.

High Seas' Motion for Summary Decision

9. High Seas' amended engineering received, the merger accepted, and the dismissal agreements approved, we move to the only other problem that stands in the way of completely resolving this case, High Seas' motion for summary decision.

10. High Seas filed its application on February 12, 1986. On May 13, 1986, when the Chief, Video Services Division designated this proceeding for hearing, he found that High Seas violated 47 CFR 73.685(e), and specified a 73.685(e) waiver issue against High Seas. See 51 F.R. 22865 published June23, 1986 at para. 4 and Issue 2.

11. High Seas has now reconfigured its directional array and reduced its proposed power (See paras. 5-6 *supra*.). As amended High Seas' will protect Table Mountain and avoid the need for a waiver.

Ruling

12. High Seas' unopposed summary decision request will be granted. No genuine issue of fact exists; the basic facts are undisputed; the truth is clear. High Seas is entitled to a favorable ruling on the 47 CFR 73.685(e) waiver issue that has been designated against it. Moreover, since Issue 2 has been resolved in its favor, and since there are no other basic qualifying issues outstanding against it, High Seas' application can be granted now.

Findings of Fact

13. High Seas seeks authority to construct a new commercial television station on Channel 59, Denver, Colorado. The following issue has been specified against it:

"...

2. To determine with respect to ... High Seas, whether circumstances exist to warrant a waiver of Section 73.685(e) of the Commission's Rules..."

14. High Seas has amended its application in such a manner as to moot Issue 2. It has reconfigured its proposed directional array, and reduced its proposed, power so as to eliminate the need to seek a waiver of 47 CFR 73.685(e). Since Issue 2 has been resolved in High Seas' favor, and since it is otherwise qualified to construct and operate as proposed, a grant of its application would serve the public interest, convenience, and necessity.

Conclusions of Law

15. So the Joint Motion for Approval of Agreement that the five applicants filed on October 3, 1986, IS GRANTED, and the accompanying Memorandum of Settlement (dated September 15, 1986) IS APPROVED;

The Motion for Leave to Amend that High Seas Communications Corp. filed on October 3, 1986, IS GRANTED;

The Motion for Summary Decision that High Seas filed as a general partner of the Denver Channel 59 Partnership, Ltd. on October 3, 1986. IS GRANTED;

BPCT-851231KE, BPCT-860212KN, BPCT-860212LG, and BPCT-860212LH ARE DISMISSED with prejudice; and Unless an appeal is taken from this Summary Decision or the Commission reviews it on its own motion, [4] BPCT-860212KP as amended IS GRANTED subject to the following condition:

"At the time of equipment tests, permittee will contact the Radio Frequency Management Office of theNational Oceanographic and Atmospheric Administration's Environmental Research 'Laboraties in Boulder, Colorado, at the address specified in Section 73.1030(b) of the Commission's Rules. Permittee will cooperate with the Radio Frequency Management Office staff in a measurement program to establish that the field strength of the permittee's signal in the vicinity of coordinates 40 degrees 7'50" N. Latitude, 105 degrees 14'40' W. Longitude does not exceed 30 mV/m. In the event the measured value exceeds 30 mV/m, operation of the station (program tests) shall not be commenced. Instead, the permittee will submit an application for modification of its construction permit to reduce the field strength at the Table Mountain Radio Receiving Zone below that specified level. A license application will be granted only with the concurrence of the Radio Frequency Management Office as to the adequacy of the protection afforded to the Table Mountain Radio Receiving Zone."

This proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Walter C. Miller
Administraive Law Judge

FOOTNOTES

[1] High Seas filed a Motion to Correct its Motion for Leave to Amend and its Motion for Summary Decision on October 6, 1986. That Motion was granted. See FCC 86M-3036 released October 9, 1986.

[2] There are both character issues and character allegations outstanding against Brassell and Romero. See FCC 86M-2837, released September 16, 1986, and Motion to Enlarge Issues filed by Clear Creek County, Colorado against Brassell and Romero on August 22, 1986. But these facts pose no bar to the pay-off here. For as the Commission has said: "We believe the public interest can be adequately protected by other Commission procedures where unresolved and material allegations remain against the dismissing applicant. If the dismissing applicant is an existing licensee, those allegations can be revisited in a license renewal, transfer, or assignment proceeding." *Allegan County Broadcasters, Inc.*, 83 FCC 2d 371 (1980).

[3] High Seas has attached to its Motion for Leave to Amend a letter from the Radio Frequency Management Officer of the United States Department of Commerce. That letter, dated September 18, 1986, declares that High Seas has successfully coordinated its amended operation with the Radio Frequency Management Office.

[4] If exceptions aren't filed within 30 days, and the Commission doesn't review the case on its own motion, this Summary Decision will become effetive 50 days after its public release. See 47 CFR 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Application for Review of Monetary
Forfeiture Assessed Against Standard
Communications Corporation

MEMORANDUM OPINION AND ORDER

Adopted October 6, 1986 ; Released: October 31, 1986

By the Commission:

1. The Commission has before it an application for review (application) filed pursuant to 47 C.F.R. §1.115(a) by Standard Communications Corporation (Standard). Standard requests that the Commission cancel or mitigate a two-thousand dollar ($2,000) monetary forfeiture assessed against them for violating one of our import rules. Standard's alternative requests are denied for the reasons below.

2. On March 20, 1985, Standard was issued a citation for willfully violating 47 CFR §2.1202(a) by importing radio frequency (RF) devices without any required FCC Form 740. Citations are issued pursuant to 47 U.S.C §503(b)(5) to inform entities who are not Commission licensees of their violative behavior and encourage future compliance. Despite this warning on June 3, 1985, Standard again violated the same rule by importing RF devices without any FCC Form 740. Since Standard had been forewarned, the Commission's Long Beach office properly issued them notices of apparent liability and forfeiture, pursuant to 47 U.S.C. §503(b). On November 18, 1985, Standard submitted a request for reconsideration of the forfeiture. That request was denied in a February 5, 1986, response from the Chief, Field Operations Bureau.

3. Standard's present application suggests that we review and revise our policy of assessing "such a large penalty in the first or second alleged violation." Under section 1.115(b)(2)(iii) of the Commission's Rules, 47 CFR §1.115(b)(2)(iii), Standard's suggestion is a recognized basis for an application. However, we decline to follow their suggestion and grant them relief. The Commission takes into account many factors when deciding the amount of any forfeiture. These factors include the circumstances and seriousness of the violation, *In the Matter of Liability of Triple X Broadcasting Co.*, 46 RR 2d 788, 789 (1979), and the considerations specified in section 503(b)(2) of the Communications Act of 1934, as amended (the Act).[1] Circumstances here indicate that on June 3, 1985, Standard knowingly omitted a required FCC Form 740 from the entry papers that it submitted to the U.S. Customs Service. Our policy of imposing substantial forfeitures for first or second violations is well-founded and especially appropriate here. Commission import rules are adopted to limit the entry and subsequent marketing of radio frequency devices and subsassemblies that can cause harmful interference. *Importation of Radio Frequency Devices*, 37 RR 2d 847 [1976]. However, we cannot possibly detect every violation of our import rules. Therefore, we must encourage consistent compliance by imposing forfeitures when, at various times, we discover violations. Standard violated one of our rules, was warned, then violated the same rule again. We decline Standard's invitation to forgive repeat offenders.

Adoption of such a policy could lead us down the slippery slope towards forebearing from enforcing FCC importation rules, which are promulgated pursuant to the Act.[2]

4. Standard's contention that their omission of required forms "constitutes no more than a technical or a clerical error" (App. for Review at 1) implies the type of indifference to Commission Rules that justifies the imposition of forfeitures. *Midwest Radio - Television Inc.*, 1 RR 2d 491 [1963]. Employee acts or omissions, such as clerical errors in failing to file required forms, do not excuse violations. *TransAmerica Broadcasting Corp .*, 23 RR 2d 777 [1972]; *Kalamazoo Broadcasting Co ., Inc.*, 19 RR 2d 805, 808 [1970]; *United Broadcasting Co.*, 10 RR 2d 915 [1967]; *Centennial Radio Corp.*, 3 F.C.C. 2d 328 [1966]. Failures to file required Commission documents are considered serious violations which often result in substantial forfeitures. See generally *TransAmerica Broadcasting*, (supra) (failure to file time brokerage contracts contributed to $5,000 forfeiture); *Radiozark Broadcasting of Louisiana , Inc.*, 22 RR 2d 1101 [1971] (failure to timely file required amendments contributed to $7,500 forfeiture); *Radio Station KAYE*, 7 RR 2d 313 [1966] (failure to file various required documents resulted in $1,200 forfeiture).

5. We refuse to adopt Standard's second suggested policy change that would require the Commission to acknowledge every FCC Form 740 that it receives. Standard's claim, that they mailed the required forms to our Washington office but we never received them, is extremely rare. The dubious benefits of our acknowledging every FCC Form 740 received do not justify the considerable costs that such a practice would generate. Of course, importers may send their forms by certified or registered mail to allay any of these concerns.

6. Standard's request for review did not present any new evidence or facts that were not originally considered in the Bureau decision to uphold their forfeiture.

7. We have reviewed the Bureau's action and find no error. Accordingly, IT IS ORDERED that, pursuant to section 1.115(g) of the Commission's Rules, 47 CFR §1.115(g), Standard's requests that the Commission cancel or mitigate forfeiture number 3153602-041 are hereby DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico,
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

ALASCOM, INC.	File Nos. 6379-CF-P-80
	3678-CF-P-82
	6385-CF-P-80
	6378-CF-P-80
	6381-CF-P-80
	6380-CF-P-80
	6384-CF-P-80
UNITED UTILITIES, INC.	File Nos. 6829-CF-P-80
	4361-CF-P-82
	6830-CF-P-80
	6828-CF-P-80
	4369-CF-P-82
	6832-CF-P-80
	10860-CF-P-80
	4368-CF-P-82
	6831-CF-P-80
	4370-CF-P-82

For construction permits in the Domestic Public Fixed Point-to-Point Microwave Radio Service for the establishment of seven new stations at or near the Alaska communities of Akiachak, Chauthbaluk, Kasigluk, Kwethluk, Napakiak, Napaskiak and Nunapitchuk.

MEMORANDUM OPINION AND ORDER

Adopted: October 6, 1986 **Released: October 31, 1986**

By the Commission:

1. The Commission has before it for consideration: (1) the above-referenced applications of Alascom, Inc. ("Alascom") and United Utilities, Inc. ("United"); (2) petitions to deny and other related pleadings filed by Alascom and United; and (3) an "Order Making Recommendations to Federal Communications Commission" filed by the Alaska Public Utilities Commission ("APUC") and accompanying testimony and exhibits.

INTRODUCTION

2. The captioned applications represent competing proposals by Alascom and United to provide improved telephone service, via point-to-point microwave radio, to some of Alaska's tiny and remote "Bush" villages.[1] The Commission has previously determined that both applicants appear to be technically and financially qualified to construct and operate their proposed facilities, and no evidence has been submitted in this proceeding to contradict those determinations. The Commission also has found that the applications are mutually exclusive because, due to their small size, the individual villages would not provide a sufficient financial base to warrant service from two separate telephone systems.[2]

3. Economic considerations also convinced the Commission that oral comparative hearings would be inappropriate to select which applicant would best serve the public interest because they are time consuming and expensive. Designating the subject applications for comparative hearings would impose substantial costs on the parties and ultimately on their ratepayers. In addition, hearings would add further delay in providing communications services to the Bush villages without apparent public interest benefits.

4. Because of the potentially undesirable consequences of comparative hearings, the Commission attempted to persuade Alascom and United to reach mutually acceptable arrangements for providing telephone service to the Bush villages.[3] In large part, these efforts, coupled with the assistance of the APUC, have been successful. In at least thirteen instances the applicants have agreed to provide telephone service via jointly owned and operated satellite earth stations instead of individually owned microwave radio stations as originally proposed. Alascom and United, however, were unable to reach a similar accord for the remaining seven villages.

5. In response to Alascom's suggestion "that the Commission request the Alaska Public Utilities Commission to examine the circumstances of service to the Alaska Bush villages involved and provide guidance to the Commission regarding the appropriate point of interconnection between the companies .",[4] and with the concurrence of United,[5] the Commission, in its letter of June 7, 1985, requested the APUC to use its good offices to assist the Commission in making a determination of how and to whom the authorizations for the point-to-point microwave radio stations should be issued.[6]

6. In response to the Commission's request for assistance, the APUC collected copies of all the pleadings that had been filed by Alascom and United, and opened a proceeding to consider the dispute between the two applicants.[7] It appointed a hearing officer, established filing requirements and scheduled a public hearing. Written and oral testimony, accompanied by related exhibits, was presented by each side to show that the public interest would be best served by a grant of its applications.[8]

ALASCOM

7. In presenting its case, Alascom initially noted that its fitness to own and operate microwave stations has been demonstrated for the nearly 15 years that it has operated toll microwave facilities linking local exchanges to its toll network. It pointed out that its net book investment at the disputed locations is $741,265, and that a $140,000 upgrade at Kwethluk is underway.[9]

8. Alascom averred that the comparative merits of its proposals are superior. It said that it is just as concerned with local needs as United and that it can provide service for much less expense than United. By United's own admission, said Alascom, a grant of United's seven applications would result in a revenue shift of as much as $196,000 from the interstate jurisdiction to the intrastate jurisdiction. Such a shift, said Alascom, would be contrary the goals for which the state of Alaska has long worked. Alascom added that maintenance costs for the stations are quite low. During 1984, it said, it spent only an average of 1.24 to 3.82 hours per month maintaining the seven sites, at a total cost of $14,685.40. Because the cost of maintenance is low, Alascom submitted that United's proposal to employ part-time local representive to

perform simple maintenance and make nominal repairs, when necessary, would offer little cost savings. Furthermore, said Alascom, since United's local representives' competency would be so limited they would play an insignificant part in the operation of the microwave facilities, and United's full-time maintenance staff has not the depth or competence of Alascom's.

9. Alascom stated it should be preferred over United because United's interests are primarily local and thus it would have little interest in system-wide planning or any process that balanced the cost of facilities desired against the need for service. In fact, said Alascom, the APUC had previously recommended against local ownership of earth stations because it was not confident that local exchange companies would accept Alascom's leadership in system management.

10. Alascom also expressed its disinterest in joint ownership of the disputed facilities, saying that this arrangement would lead to inefficiencies and diseconomies. Consequently, joint ownership would not be in the best interests of the Alaska rate payers.

11. In subsequent testimony, however, Alascom admitted that the figures given for it maintenance expenses did not include the costs of transportation, building rental, or work on the power system of the Kasigluk facility. In fact, it ultimately confessed that it was unable to substantiate the accuracy of the figures it had presented. It also conceded that the revenue shift from inter to intrastate would be inconsequential, maintenance of a point-to-point station is relatively simple and it would be advantageous to employ local representatives to make minor repairs.

UNITED

12. United, which is a local exchange carrier, began its testimony by declaring that it is fully capable of owning and maintaining microwave facilities. It stated that it already owns and operates rural radio stations in the Alaska Bush and that there is very little difference between the transmitters and receivers at these locations and the radio equipment associated with the microwave sites.

13. United declared that it will be able to provide better service than Alascom at less expense to the Bush village residents. United submitted that it can build and operate the stations for much less money than Alascom. For instance, Alascom, said United, has constructed buildings to house radio equipment at Kasigluk, Akiachak and Napakiak at a cost of $873 per square foot. These buildings are on United's land and within 30 feet of United's building, which, United contends, Alascom could have used to accommodate its equipment. United's buildings, on the other hand, said United, were constructed at a cost of $111 per square, an eighth the cost incurred by Alascom.

14. United argued further that its maintenance program is both superior to and less expensive than Alascom's. It said that it would utilize a three tier maintenance program. Routine maintenance would be performed by local, part-time personnel, more complicated maintenance and repairs would be done by a roving technician and, should the need arise, major repairs would be made by specially trained staff. United said that each site would require about 6-10 hours of maintenance and repairs per month, 75-90 percent of which could be handled by the local representative. The local representatives would receive an hourly salary, said United, of about $10, rather than the $25 per hour that Alascom pays its technicians. Moreover, even greater savings would be realized by the use of local part-time personnel because their use would eliminate the considerable expense that Alascom incurs each time it dispatches its technicians to a Bush village facility to make minor repairs. Elimination of travel would have the added benefit of minimizing outages related to power.[10]

15. The economies that would be realized from lower maintenance and construction costs, as well as the subsidy it receives from the NECA pool, said United, would offset the shift in revenue requirement from inter to intrastate. United estimated that its revenue requirement would be $351,000 per year, of which $314,000 would be recovered from intrastate. Alascom's total revenue requirement, said United, is $415,000 of which $118,000 is recovered from intrastate. The $196,000 shift in revenue requirement to the state side, said United, represents less than 0.5% of the total statewide intrastate revenue requirement.[11]

16. Finally, United agreed with Alascom that joint ownership would not be a satisfactory alternative. United contended that this type of partnership would be detrimental to it, since Alascom would be the dominant partner whose policies would always prevail.

APUC'S RECOMMENDATION

17. The APUC, having considered the evidence and argument presented before it by the two applicants, concluded that United should be granted sole authority to own and operate microwave radio stations in the disputed Bush villages.[12] It said that it based its decision primarily on the fact that United had made a convincing demonstration that it would be able to operate, maintain and construct, where necessary, microwave facilities in the seven villages at a lower cost than Alascom. The lower cost, the APUC said, would be achieved through United's use of local representatives to perform routine maintenance and to correct outages caused by minor problems, as well as through better planned and lower cost construction of facilities. These lower costs, the APUC submitted, would ultimately result in lower rates.

18. The APUC found none of the arguments presented by Alascom persuasive. It said that although Alascom was given authority to construct facilities at four of the disputed locations, this does not mean that it should be allowed to keep those authorizations. The APUC pointed out that Alascom was given authority to construct the facilities, while the subject applications were pending, without prejudice to the ultimate disposition of the proceeding.[13] Nor did the APUC find the transfer of revenue requirement from interstate to intrastate rate payers, resulting from United's ownership of the facilities, decisionally significant. Finally, the APUC said that Alascom had failed to make a convincing demonstration that United was less financially or technically qualified than it to own, operate and maintain the proposed point-to-point microwave facilities or that granting United's applications would in any way harm the overall toll network.

19. However, the APUC did stress that its recommendation does not extend beyond the subject applications. Its decision, it said is not a blanket endorsement of local ownership of microwave or similar facilities.

DISCUSSION AND CONCLUSION

20. We have reviewed closely the APUC's recommendation, as well as the contents of the underlying record and we concur with the APUC's conclusion that it would be in the public interest for United to be awarded the authorizations for the stations in question. We believe that the selection of United as licensee of the stations will satisfy the communications needs of the residents of the Alaska Bush villages.[14] United's plan to employ local residents, aside from being operationally and cost effective, will increase its sensitivity to the individual needs of the villages it serves. The local representatives will be able to provide United with first hand information regarding the services desired by the villages' rate payers and thereby increase its accountability.[15]

21. Local ownership of toll microwave facilities also should afford United a greater role in the planning and development of the Alaska telecommunications network. United's involvement will introduce more directly its perspective and experience, bringing to light viewpoints that might otherwise go unnoticed. This broader planning perspective, we expect, will lead to consideration of alternative plans and ultimate improvement in the network.[16]

22. Finally, as we noted initially, Alascom and United had filed petitions to deny. These petitions raise no substantial and material questions of fact requiring further discussion. The allegations contained therein are comparative in nature, *i.e.*, each petitioner claiming its proposal to be superior to the other's. These issues were aired in the hearing before the APUC at which both parties fully participated. Given the fact that the two applicants have settled their differences over many of the disputed facilities, and their willingness to abide by the APUC's recommendation, we find that the petitions are now moot and should therefore be dismissed.[17]

23. Accordingly, IT IS ORDERED, that the petitions to deny and related pleadings filed by Alascom, Inc. and United Utilities, Inc. ARE DISMISSED.

24. IT IS FURTHER ORDERED, that the captioned applications of Alascom, Inc. ARE DENIED.

25. IT IS FURTHER ORDERED, that the captioned applications of United Utilities ARE GRANTED.

26. IT IS FURTHER ORDERED that the existing microwave radio facilities constructed by Alascom, Inc. at Akiachak, Chauthbaluk, Kasigluk, and Nunapitchuk pursuant to temporary authority and without prejudice to the ultimate resolution of the subject applications be transferred to United Utilities, Inc. upon the latter's payment to the former of fair and equitable compensation approved by the Alaska Public Utilities Commission based on the net book value of the facilities transferred or such other form of valuation as agreed to by the parties.

Federal Communications Commission

William J. Tricarico
Secretary

FOOTNOTES

[1] The term "Bush" villages refers to small villages, seldom with populations over 200, in rural Alaska that are isolated from larger cities by rugged terrain and harsh weather conditions.

[2] *See* Earth Stations re: Tentative Decision to Establish Joint Ownership, 92 F.C.C. 2d 736 (1982) (*Tentative Decision*) where the Commission made a similar determination regarding competing applications filed for satellite earth station facilities.

[3] *See, e.g.*, Letter from Chief, Common Carrier Bureau to Vinod K. Batra, President, United and James T. George, Manager, Southern District, Alascom, dated December 31, 1984.

[4] Letter from counsel for Alascom to Chief, Common Carrier Bureau, dated February 15, 1985.

[5] Letter from counsel for United to Chief, Common Carrier Bureau, dated March 6, 1985.

[6] *See* Section 21.35 of the Commission's rules which contemplates parties agreeing to informal processes to resolve mutually exclusive situations.

[7] Alaska Public Utilities Commission, Docket U-85-47.

[8] The public hearing was held, as scheduled, on November 14, 1985. Alascom presented two witnesses in its behalf, George S. Shaginaw, Executive Vice President and General Manager of Alascom, and Kenneth L. Anderson, Outlying Area Supervisor for the Bethel area for Alascom. United presented one witness on its behalf, Vinod K. Batra, President and Chief Executive Officer of United.

[9] Alascom has UHF facilities in place at Kwethluk, Napakiak and Napaskiak. It also has been granted interim authority to provide point-to-point microwave service at the remaining four subject villages, on a temporary fixed basis, pending, and without prejudice to, the outcome of this proceeding.

[10] A further indication that its selection over Alascom would be in the public interest, said United, is the fact that it has maintained the same local rates since its inception in 1979. It has been able to achieve this through cost-effective means and the use of innovative technology and ideas, and without support from the toll pool. Alascom, on the other hand, said United, has raised its rates twice and it is applying for authority for a third rate increase. Alascom's current rate of return is over 16%, whereas United's is less than 5%.

[11] United's composite toll is 85% intra and 15% interstate vs. 30% intra and 70% interstate for Alascom.

[12] Its recommendation, it said, extends to the subject villages where Alascom has UHF facilities in place. These villages, the APUC said, would be better served with microwave facilities. However, in order to minimize waste and avoid possible duplication, the APUC recommended that United utilize the facilities that Alascom had previously constructed, especially existing towers, to the maximum extent that those facilities are compatible with microwave service, and that Alascom be required to transfer those facilities to United. The APUC stated further that it would be available to aid in resolving any dispute regarding the appropriate cost at which the UHF facilities should be transferred.

[13] *See* note 9, *supra*.

[14] It is apparent, given the objections voiced by Alascom and United, that joint-ownership of the microwave facilities is not the best resolution of this proceeding.

[15] Increasing carrier accountability has been identified as an objective of the Communications Act. *See, e.g.*, AT&T Private Line Services (Docket 18128), 61 F.C.C. 2d 587, 610-612 (1976), *recon.*, 67 F.C.C. 2d 1441 (1978).

[16] *See Tentative Decision, supra*.

[17] Regarding the UHF facilities discussed in note 12, *supra*, we anticipate that the parties will file the appropriate transfer applications.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND
TELEGRAPH COMPANY

PACIFIC TELEPHONE AND
TELEGRAPH COMPANY

SOUTHWESTERN BELL
TELEPHONE COMPANY

Tariff F.C.C. No. 270, 1.544 Mbps
Channels for Connection with
Interstate Communications Systems

ORDER

Adopted: October 20, 1986; Released: October 31, 1986

By the Commission:

1. On June 13, 1986, the U.S. Court of Appeals for the District of Columbia Circuit issued an Order in *Pacific Bell v. FCC*, No. 85-1599, granting the Commission's motion to remand and vacate our decision there under review.[1] Pacific Bell[2] has filed a Motion to Vacate Opinions and Orders in the captioned proceeding based on the court's Order.

2. This controversy began in 1983 when two telecommunications users, Crowley Maritime Corporation (Crowley) and Atlantic Richfield Company (ARCO), directed separate letters to the Common Carrier Bureau complaining that they were unable to obtain 1.544 Mbps channels under American Telephone and Telegraph Company's (AT&T) Tariff F.C.C. No. 270 between points within a state for connection with their privately-operated interstate communications systems. Instead, according to their letters, Crowley and ARCO would be charged higher intrastate tariff rates under Southwestern Bell Telephone Company (SWB) and Pacific Bell intrastate tariffs for these channels. In response, the Bureau issued an *Order to Show Cause*, Mimeo No. 4537, released June 3, 1983, directing the carriers to explain why the facilities at issue should not be provided under AT&T's interstate tariff.

3. After reviewing the pleadings filed in response to the *Order to Show Cause*, the Bureau issued a *Memorandum Opinion and Order*, Mimeo No. 636, released Nov. 8, 1983, which ordered AT&T, SWB and Pacific Bell to "provide physically-intrastate and intraexchange 1.544 Mbps service for use in carrying interstate communications through connection with private communication systems at the rates specified in AT&T's Tariff F.C.C. No. 270, in accordance with customers' requests." In a second *Memorandum Opinion and Order*, Mimeo No. 3267, released Apr. 3, 1984, the Bureau denied a petition for partial reconsideration and motion for stay of its November 8, 1983 Order filed by Pacific Bell.

4. Applications for Review of the Bureau's April 3, 1984 Order were filed by Pacific Bell and jointly by the People of the State of California and the Public Utilities Commission of the State of California. In our *July 25 Order*, we affirmed the Bureau's disposition of this matter but granted Pacific Bell's application only insofar as to distinguish earlier Commission precedent.

5. Pacific Bell, the People of the State of California and the Public Utilities Commission of the State of California petitioned the U.S. Court of Appeals for the District of Columbia Circuit for review of our July 25, 1985 Order. In filing a motion with the court to remand the case, we asserted that the case had become moot because Crowley had never completed service arrangements with Pacific Bell for the facilities and services at issue but had instead made alternative arrangements with another carrier. We further indicated that we would vacate our Order and the Bureau's underlying Orders in this matter. The court's June 13, 1986 Order declared the case moot and remanded it to this Commission with instructions to vacate the Order under review.[3]

6. Accordingly, IT IS ORDERED that this Commission's *Memorandum Opinion and Order*, FCC 85-368, and the Common Carrier Bureau's *Memorandum Opinion and Orders*, Mimeo Nos. 4537, 636 and 3267, ARE VACATED insofar as they relate to the request of Crowley Maritime Corporation for the facilities and services described therein.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

FOOTNOTES

[1] American Tel. & Tel. Co., 103 FCC 2d 69 (1985) *(July 25 Order)*.

[2] Pacific Bell is the new name for the Pacific Telephone and Telegraph Company.

[3] On July 26, 1986, Pacific Bell filed a Petition for Rehearing with the court requesting that the court modify its Order to require the Commission to vacate the Bureau's underlying Orders in this matter as well as our Order under review.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 80-286

MTS and WATS Market Structure

Amendment of Part 67 of the
Commission's Rules and
Establishment of a Joint Board

ORDER

Adopted: October 23, 1986 Released: October 31, 1986

By the Chief, Common Carrier Bureau

1. We have before us a "Request for Extension of Time" filed on October 20, 1986, by the National Rural Telecom Association, the National Telephone Cooperative Association, the Organization for the Protection and Advancement of Small Telephone Companies, and the United States Telephone Association (collectively "the Petitioners") asking that the time for filing reply comments on issues set out in the Federal-State Joint Board's Order Inviting Comments and Request for Data, FCC86J-1 (released May 7, 1986), be extended from October 24, 1986, to November 3, 1986. By an order *MTS and WATS Market Structure*, Mimeo No. 0076 (released October 8, 1986) we partially granted a previous request made by the Petitioners and extended the date for filing reply comments from October 10, 1986, until October 24, 1986. The Petitioners claim that the extension granted is not sufficient to permit the best possible analysis of the data and formulation of recommendations, and consequently they ask for a further extension.

2. The reply comments at issue here concern Category and Category 8 Central Office Equipment. The Petitioners claim that factors not anticipated when the previous extension was granted justify the grant of a further extension. They state that delays in processing the data relating to these two categories of Central Office Equipment resulted in the data being available in useful form only just prior to October 20, 1986, and that adequate time is not available properly to review this material and prepare reply comments by October 24, 1986.

3. Given the need to avoid delay in the resolution of this proceeding, we do not believe that the grant of the full ten days requested is desirable. We will, however, grant a five-day extension until October 29, 1986. This additional time should allow the Petitioners adequate time to prepare and submit their reply comments.

4. Accordingly, IT IS ORDERED, that the Request for Extension of Time filed on October 20, 1986, IS GRANTED to the extent indicated above; and

5. IT IS FURTHER ORDERED, that the date for filing reply comments in this proceeding IS EXTENDED to October 29, 1986.

FEDERAL COMMUNICATIONS COMMISSION

Albert Halprin
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELEMARKETING COMMUNICATIONS OF SOUTHEAST FLORIDA — File No. I-T-C-86-173

Application for authority to operate as an international resale carrier

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: October 24, 1986 **Released: October 31, 1986**

By the Common Carrier Bureau:

1. The Commission is considering an application, filed on August 25, 1986, by Telemarketing Communications of Southeast Florida (TCSF), requesting authority to use existing message telephone facilities to provide international switched voice services between the U.S. and various overseas points. TCSF proposes to use existing facilities of other international carriers to provide the proposed services. The application was placed on public notice on September 3, 1986. No comments were received.

2. Upon review of the application, we find that the applicant has the legal, technical and financial qualifications to provide the proposed services. TCSF, a Florida Corporation, is already providing domestic resale services. It now proposes to compete with other carriers which already provide international switched voice services. In recent authorizations of new entrants, the Commission has recognized that increased competition in international markets is beneficial.[1] We find that the market will support additional carriers and that the added competition will be in the public interest.[2]

3. For the foregoing reasons, IT IS CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice services to the general public by TCSF.

4. Accordingly, IT IS ORDERED that application File No. I-T-C-86-173 IS GRANTED, and TCSF is authorized to provide international switched voice services between the U.S. and Canada and Mexico and those points listed in AT&T's Tariff F.C.C. No. 1.

5. Copies of any operating agreements entered into between TCSF and its correspondents will be filed with the Commission within 30 days of their execution.

6. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order (see Section 1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

James L. Ball
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] See the cases cited in Teltec Saving Communications Co., Mimeo No. 3548 (released April 4, 1986) at n. 2.

[2] FCC v. RCA Communications, Inc., 346 U.S. 86 (1953), Mackay Radio and Telegraph Co., 28 FCC 231 (1960).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

OVERSEAS tTELECOMMUNICATIONS, INC. File No. CSG-86-071-P/L

Application for authority to construct an international earth station at Cape Canaveral, Florida for provision of INTELSAT Business Services

ORDER AND AUTHORIZATION

Adopted: October 24, 1986 Released: October 31, 1986

By the Common Carrier Bureau:

1. The Commission is considering an application filed on August 29, 1986 by Overseas Telecommunications, Inc. (OTI), requesting authority, pursuant to Title III of the Communications Act of 1934 and Sections 201 (c)(4), (c)(6) and (c)(7) of the Communications Satellite Act of 1962 to construct and operate international earth station facilities at Cape Canaveral, Florida for provision of INTELSAT Business Services (IBS). The application was placed on public notice on September 10, 1986. No comments were received. The applicant has been granted blanket authority to establish and operate channels of communication between the U.S. and various overseas points for provision of IBS services.[1]

2. The proposed earth station will consist of an 8.0 meter antenna connecting with an INTELSAT V satellite in the 6/4 GHz band. The earth station will be constructed on U.S. government property at Cape Canaveral, Florida and will be used to provide a full range of IBS services to customers in the area.

3. In its Report and Order in the *Earth Station Ownership Proceeding* in CC Docket No. 82-540, the Commission modified its policy on the ownership and operation of U.S. international earth stations that access the INTELSAT system by permitting carriers, individually or jointly, to own and operate their own earth station facilities.[2] In that Order, the Commission distinguished between IBS and/or television earth stations and multipurpose stations. It determined that earth stations dedicated to providing IBS and/or television services do not raise the same concerns about impact on the INTELSAT system that are raised by multipurpose stations. The Commission therefore concluded that it would consider only minimal legal, financial, and technical qualifications of the applicant as required by Sections 308 and 319 of the Communications Act of 1934, as amended, when processing IBS and television service applications. The Commission further concluded that absent special problems, it would treat these applications as routine and expeditiously process them.[3] The Commission has granted other applications to construct and operate earth stations based on this approach.[4]

4. OTI's legal, technical and financial qualifications to construct and operate the proposed earth station are established. OTI has been authorized to construct and operate other IBS earth stations.[5] The proposed earth station complies with INTELSAT performance criteria for IBS stations. OTI has completed the necessary frequency coordination.

5. The scope of operation of the proposed station will be the same as that permitted by the Commission in previous IBS authorizations. We will limit the authorization to the provision of IBS and those video services compatible with the station's digital format operation. To the extent that the applicant may seek to provide certain newly proposed INTELSAT services which fall within the IBS/television service category, we will not restrict operation of the proposed stations. However, it may not provide any service which falls outside the IBS/television service category. Any authorization to use the proposed station as a multipurpose earth station would require a determination as to traffic and revenue diversion from existing multipurpose earth stations that may result.

6. Upon consideration of the application, we find that authorization of the requested services and facilities is required by the public convenience and necessity.

7. Accordingly, IT IS ORDERED, pursuant to Section 304, 309, and 319 of the Communications Act of 1934, and Section 201(c) of the Communications Satellite Act of 1962, that application File No. CSG-86-071-P/L IS GRANTED, and OTI is authorized to construct and operate the proposed earth station at Cape Canaveral, Florida to provide IBS and related digital video services.[6] Before completion of the equipment installation and facility activation, however, the applicant should provide the Commission with a summary of actually installed equipment.

8. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

James L. Ball
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] See *AT&T et al.*, (File No. I-T-C-85-035 *et al.*), Mimeo No. 3220 (released March 18, 1985).

[2] Earth Station Ownership, 100 FCC 2d 250 (1984).

[3] Upon grant of an IBS/television service application, the applicant will be issued a combined Radio Station Construction Permit and License (FCC Form 456-P). The Commission will limit the use of the facilities authorized for provision of IBS or television services. Carriers must seek additional authorization if they desire to use these facilities as multipurpose earth stations.

[4] *See* cases cited in Satellite Gateway Communications, Inc., Mimeo No. 2696 (released March 4, 1986) and American Telephone and Telegraph Co., Mimeo No. 3327 (released March 25, 1986).

[5] See Overseas Telecommunications, Inc., File No. CSG-86-061-P/L, (released October 10, 1986).

[6] This authorization is not to be construed as permitting the provision of IBS between earth stations located within the United States.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GTE TELENET
COMMUNICATIONS CORPORATION

Complainant,

v. File No. E-81-32

AMERICAN TELEPHONE AND
TELEGRAPH COMPANY,

Defendant.

MEMORANDUM OPINION AND ORDER

Adopted October 24, 1986; Released October 31, 1986

By the Chief, Common Carrier Bureau:

1. The Bureau has before it a petition for partial reconsideration of our *Memorandum Opinion and Order*, Mimeo No. 5670 (released July 10, 1986) (*July Order*), in the above-captioned proceeding, filed by Tymnet-McDonald Douglas Network Systems Company (Tymnet) on August 11, 1986. Opposition pleadings to the motion were filed by GTE Telenet Communications Corporation (Telenet) and American Telephone and Telegraph Company (AT&T). Tymnet filed a consolidated reply to those pleadings.

2. On May 29, 1986, the Bureau issued an order in this proceeding which, based on the evidence of record filed by the parties, granted the relief sought by the complainant in part and denied it in part. *GTE Telenet Communications Corp.v . AT&T*, Mimeo No. 4755 (released May 29, 1986) (*May Order*). In that Order, we directed Telenet and AT&T to undertake good faith efforts to reach a settlement of all financial claims, consistent with the parameters set forth in the Order. The parties were further ordered to report the results of such negotiations to the Commission. On June 16, 1986, AT&T and Telenet filed a "Settlement Agreement" along with a "Joint Motion To Dismiss Complaint and Vacate Common Carrier Bureau Order" (Motion to Vacate). A critical element of the Settlement Agreement was that its implementation was contingent on the Bureau granting the Motion to Vacate. After consideration of the equities involved, the Bureau granted the parties' Motion to Vacate and approved the Settlement Agreement in July 1986.

3. Tymnet seeks reconsideration of that portion of the *July Order* which vacated the *May Order* finding, with respect to Telenet, that rates charged by AT&T for 56 Kbps Dataphone Digital Service from January 1, 1982 through April 27, 1985 were unlawful. Characterizing itself as a major user of AT&T's 56 Kbps service,[1] Tymnet argues that the Bureau's action in vacating the *May Order* effectively precludes it and other users of the service from relying on the Bureau's findings and conclusions regarding the lawfulness of the rates charged by AT&T. Had the *May Order* been allowed to stand, Tymnet contends, the "collateral estoppal effects" of the Order would have precluded the need for it and others similarly situated to relitigate questions of law and fact already decided by the Bureau. Instead, Tymnet claims, the Bureau's action has increased the likelihood of "protracted and costly litigation" as well as the possibility of "inconsistent and inequitable" results in other complaint proceedings involving substantially the same set of facts. For these reasons Tymnet argues that the decision to vacate the *May Order* was inconsistent with the public interest and should be reversed.

4. Tymnet's petition will be dismissed as procedurally defective. Section 1.106(b) of the Commission's rules, 47 C.F.R. § 1.106(b), establishes prerequisites to standing for the purpose of securing reconsideration of Commission actions. That section provides that when a person not previously a party to a proceeding files a petition for reconsideration, the party must show good cause why it was not possible to participate during the earlier stages of the proceeding.[2]

5. In anticipation of the obstacle presented to the petitioner by the clear language of Section 1.106(b), Tymnet attributes its failure to participate earlier to what it characterizes as the Bureau's decision not to place the Telenet/AT&T Motion to Vacate the *May Order* on public notice. As a result, Tymnet contends, it could not and did not learn of the threat to its interest in the proceeding until release of the *July Order*. Tymnet alleges that it would have filed an opposition pleading had it known about the Motion to Vacate prior to Bureau approval in the *July Order*. In the event the Bureau concludes that the requirements of Section 1.106(b) have not been met, Tymnet asks us to consider, on our own motion, the significant public policy questions raised in its petition and reinstate the *May Order*.

6. We find Tymnet's arguments regarding its failure to participate to be unpersuasive. It is irrefutable that the Telenet complaint proceeding had been a matter of public record for almost five years at the time we vacated the *May Order*. Admittedly, a "major user" of AT&T's 56 Kbps service, Tymnet has not shown that it could not have maintained familiarity with activities in the Telenet proceeding through the exercise of ordinary due diligence. Further, there is no precedent to support its proposition that the Bureau is required to give public notice of party pleadings to non-parties in the context of a complaint proceeding under Section 208 of the Communications Act. Finally, we must reject Tymnet's good cause theory, which is founded on the assertion that it was surprised at the result. As the court in *Committee for Community Access v.FCC*, 737 F.2d 74 (D.C. Cir. 1984), noted recently, were "the Commission to accept surprise as a sufficient justification for a new party to seek reconsideration, the Commission's - and indeed the public's - interest in [the finality of its decisions] would be eviscerated." 737 F.2d at 84. Accordingly, we find that Tymnet has failed to establish good cause for its failure to participate in the earlier stages of this proceeding.

7. Although we need not reach the issue given our conclusion that Tymnet's petition is procedurally defective, we do not believe reconsideration is required on the merits. We previously considered the issue of impact on the public interest based on the record before us when we approved the Telenet/AT&T Settlement Agreement and vacated the *May Order*.[3] Since we completed a thorough deliberation on the matter in the *July Order*, administrative efficiency militates against reassessment without compelling justification. We see no basis for a claim of injury

to Tymnet or other users of AT&T's 56 Kbps service as a result of our decision to vacate an order which, if reinstated, would be subject to appeal at the Commission and in the courts by either or both parties to the proceeding and require further litigation on the issue of damages.[4] In the absence of substantial and material allegations of fact sufficient to raise doubts as to the correctness of our public interest finding, we see no reason to change our ruling vacating the *May Order*.

8. Accordingly, IT IS ORDERED that the petition for partial reconsideration, filed by Tymnet-McDonald Douglas Network Systems Company, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Albert Halprin
Chief, Common Carrier Bureau

FOOTNOTES

[1] Tymnet claims to have paid AT&T approximately $7,059,336 for 56 Kbps services between January 1, 1982 and April 15, 1986. On July 18, 1986, Tymnet filed a complaint with the Commission seeking to recover from AT&T alleged overcharges paid by it for 56 Kbps services from January 1, 1982 to date. *Tymnet - McDonnell Douglas Network Systems Company v. AT&T*, File No. E-86-102 (filed July 18, 1986).

[2] *See e.g.* AT&T, 46 FCC 2d 878, 880 (1974). ("[A]n individual who has a right to participate in a proceeding before the Commission can not delay in exercising that right until the Commission has acted and then expect to be allowed to participate by filing post-grant pleadings.")

[3] Indeed, under Section 1.713 of the Commission's Rules, 47 C.F.R. § 1.713, we must determine whether authorization of a settlement agreement is consistent with the public interest. As noted above, the Telenet complaint had been a matter of public record for almost five years at the time we released the *July Order* and no other party had come forward to challenge AT&T's 56 Kbps rates. Moreover, those rates had been superseded for over a year when the *July Order* was released. We believe that our conclusion is sound, consistent with Commission precedents, and supported by the record.

[4] In any event, the evidence in the Telenet proceeding is a matter of public record and is available to anyone who seeks to use it. Tymnet will receive a full and fair opportunity to litigate its claims against AT&T in the context of its own recently instituted complaint proceeding.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AIRWAVES SATELLITE TELEVISION,

Complainant,

v. File No. E-86-3

SOUTH FLORIDA COMMUNICATIONS,

Defendant.

ORDER

Adopted October 24, 1986; Released October 31, 1986

By the Common Carrier Bureau:

1. The above-referenced complaint, relating to the Defendant's termination of Multipoint Distribution Service (MDS), was filed on October 15, 1985. The proceeding was held in abeyance pending the outcome of settlement negotiations between the parties. On or about September 15, 1986, the staff counsel was informally advised by the complainant that the matter in controversy had been settled and a dismissal letter would be forthcoming. By letter dated September 25, 1986, the Deputy Chief, Enforcement Division, formally inquired of complainant whether he wished to pursue his complaint with the Commission.[1]

2. The letter requested complainant to respond within fifteen (15) days if he wished to pursue this matter with the Commission and informed him that the matter would be dismissed if he did not contact the Enforcement Division. Since that period has passed without a response, we must conclude that the complainant is no longer interested in pursuing the complaint. Therefore, the above-referenced complaint will be dismissed.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the above-referenced complaint IS DISMISSED with prejudice.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTE

[1] *See* Letter from Deputy Chief, Enforcement Division, Common Carrier Bureau, to Thomas Romano, President, Airwaves Satellite Television, Inc. (dated Sept. 25, 1986).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Petition for Modification of the Permanent Capitalization Plan for NYNEX Business Information Systems Company — AAD 6-1507

MEMORANDUM OPINION AND ORDER

Adopted: October 20, 1986; Released: October 31, 1986

By the Chief, Common Carrier Bureau:

1. On August 11, 1986, NYNEX Corporation filed a petition pursuant to Section 64.702(d)(4) of the Commission's rules for authority to increase its capitalization of NYNEX Business Information Systems Company (NBIS) to $602.1 million. The petition was placed on public notice, but no comments were received. On October 7, 1986, NYNEX filed a "Petition for Expedited Action or, in the Alternative, for Interim Relief" (the Petition). It seeks expedited approval of the request for permanent capitalization of NBIS or, if the Commission is unable to act before October 31, 1986, interim approval of an additional $40 million pending final action. NYNEX states that the increase is needed because its recent purchase of the IBM Product Centers produced an "unexpected impact" on NBIS capitalization needs, and the impact thereon was so significant as not to be foreseeable before the acquisition.

2. We will grant the Petition and authorize NYNEX to increase its capitalization of NBIS by $40 million on an interim basis, pending our review of the larger capitalization request. We recognize that the acquisition described by NYNEX might well have an immediate but unforeseeable impact on the capitalization of NBIS. We are not able at this point, however, to fully address and resolve NYNEX's request to increase the NBIS capitalization by the full amount requested. NYNEX was granted authority to increase the NBIS capitalization to $352.1 million in January 1986, and its recent petition for additional capitalization authority raises issues about the funding of NBIS which warrant further inquiry. Under these circumstances, a grant of interim relief appears to be the preferred approach.

3. Accordingly, IT IS ORDERED, That NYNEX's Petition IS GRANTED, to the extent that it requests an interim increase in the capitalization of NBIS by $40 million, pending action on the August 1986 request for modification of the permanent NBIS capitalization.

FEDERAL COMMUNICATIONS COMMISSION

Albert Halprin
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-254

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Aiken, South Carolina)	RM-4990

REPORT AND ORDER

(Proceeding Terminated)

Adopted: October 9, 1986 **Released: October 31, 1986**

By the Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 50 Fed. Reg. 34874, published August 28, 1985, proposing the substitution of Channel 258C2 for Channel 257A at Aiken, South Carolina, and the modification of Station WNEZ(FM)'s license to specify operation on the higher powered channel, at the request of Aiken Radio, Inc. ("petitioner"). Comments were filed by the petitioner and Community Broadcasting Associates ("Community"), licensee of Station WJFX-FM, Channel 240A, Aiken, South Carolina, and reply comments were filed by the petitioner and Amici Broadcasting Corporation ("Amici"), proposed assignee of Station WJFX-FM.[1]

2. The *Notice* stated that the license of Station WNEZ(FM) might not be modified if another party expressed an interest in the allocation unless an additional equivalent channel were allocated. See *Modification of FM and TV Station Licenses*, 98 F.C.C. 2d 916 (1984) and Section 1.420(g) of the Commission's Rules. Here, such an interest has been expressed by the licensee and proposed assignee of Station WJFX-FM. However, the Commission has now amended Section 1.420(g) stating that all previously existing and new rule makings proposing adjacent channel upgrades, such as this one, may be implemented without requiring the demonstration of an additional equivalent channel for interested parties. See *Report and Order*, MM Docket No. 85-313, 51 F.R. 20290, published June 4, 1986. Therefore we believe that Channel 258C2 should be allocate to Aiken, South Carolina, and the license of Aiken Radio for Station WNEZ(FM) modified to specify operation on the higher powered channel.

3. Channel 258C2 can be allocated to Aiken in compliance with the Commission's minimum distance separation requirements if the transmitter is restricted to an area at least 22.8 kilometers (14.2 miles) northwest to avoid short-spacings to Station WDMC-FM, Douglas, Georgia, and to the construction permit of Station WOEC, Channel 259,Port Royal, South Carolina. [2] WOEC's frequency is actually allocated to Beaufort rather than to Port Royal, South Carolina, and the distance between Beaufort and Aiken is less than the required 188 kilometers for first adjacent Class C and C2 allotments. Therefore, to avoid a potential short-spacing between the use of Channel 258C2 at Aiken and Channel 259's reference coordinates at Beaufort, we are imposing an 18.5 kilometer (11.5 mile) east site restriction on the Beaufort channel. This site restriction requires no change in Station WOEC's transmitter location as specified in its construction permit.

4. We believe the public interest would benefit from the substitution of Channel 258C2 for Channel 257A at Aiken since it could provide expanded radio service to the community and its environs. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, IT IS ORDERED, That effective December 8, 1986, the FM Table of Allotments, Section 73.202(b) of the Rules, IS AMENDED with respect to the community listed below, to read as follows:

City	Channel No.
Aiken, South Carolina	240A, 258C2

5. IT IS FURTHER ORDERED, That, pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Aiken Radio, Inc. for Station WNEZ(FM), Aiken, South Carolina, IS MODIFIED effective December 8, 1986 to specify operation on Channel 258C2 in lieu of Channel 257A. The license modification for Station WNEZ(FM) is subject to the following conditions:

(a) The licensee shall submit to the Commission a minor change application for a construction permit (FCC Form 301), specifying the new facilities. (b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620. (c) Nothing contained herein shall be construed to authorize change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND a copy of this Order by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to Aiken Radio, Inc., Box 870, Aiken, South Carolina 29801.

7. IT IS FURTHER ORDERED, That this proceeding is terminated.

8. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Charles Schott
Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] In its reply comments, Amici requested that Channel 242C2 be substituted for Channel 240A at Aiken,and that Station WJFX-FM's license be modified to speciy operation on the higher powered channel. This request conflicts with the requeste substitution of Channel 243C2 for Channel 244A at Greenwood, South Carolina, filed by Eaton Broadcasting Cor-

poration. Therefore, the Commission has included Amici's proposal for consideration in that proceeding, MM Docket 86-32, 51 Fed. Reg. 4936, published February 10, 1986.

[2] The *Notice* stated that the allocation of Channel 258C2 at Aiken was contingent upon the outcome of an appeal filed by Beaufort County Broadcasting Company of the Commission's denial of its application for Channel 259 at Beaufort, South Carolina. On April 11, 1986, the U.S. Court of Appeals for the District of Columbia Circuit issued its decision affirming the Commission's denial of Beaufort's application and the grant of Barnacle Broadcasting's application for use of Channel 259 at Port Royal, South Carolina.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-13

Amendment of Section 73.202(b),	RM-4962
Table of Allotments,	RM-5063
FM Broadcast Stations.	
(Dawnville and Ringgold, Georgia)	

REPORT AND ORDER

(Proceeding Terminated)

Adopted: October 15, 1986 **Released: October 31, 1986**

By the Chief, Policy and Rules Division

1. The Commission has under consideration the *Notice of Proposed Rule Making*, 50 Fed. Reg. 4192, published February 3, 1986, proposing a first FM allotment to either Dawnville or Ringgold, Georgia. The proceeding was instituted in response to petitions filed by Maria Teresa Spina ("Spina") for Dawnville, and by Bedros D. Daghlian ("Daghlian") for Ringgold. Both petitioners filed comments restating their intention to apply for the channel if allotted to their requested community. Marshall M. Brady, Jr., also submitted comments in support of the Ringgold proposal, and stated his intention to apply for that channel. Daghlian filed reply comments.[1]

2. As stated in the *Notice* each petitioner requested the allotment of Channel 270A to their respective community. Since these proposals are mutually exclusive (the communities are 9 miles apart instead of the required 65 miles) they are being considered together. We agreed that both proposals merited consideration and requested the petitioners to demonstrate in comments to the *Notice* why its community should receive the allotment.

3. In her comments Spina incorporated by reference the information in the petition for rule making which demonstrated the need for a first FM allotment to Dawnville. Spina states that after reviewing the alternative proposal for Ringgold she is convinced that the allotment of Channel 270A to either Dawnville or Ringgold would fulfill the needs and interests of both communities. Therefore, she intends to apply for Channel 270A if allotted to either community.

4. Comments filed by Daghlian in support of the Ringgold proposal focused on the criteria used by the Commission in choosing which community should receive the allotment. Daghlian alleges that Dawnville is (1) so small it cannot be seriously considered (2) not incorporated and (3) not listed by the Census Bureau, therefore its population cannot be accurately determined. In comparison Ringgold (population, 1,882),[2] seat of Catoosa County, has a growing economy, provides its citizens with police and fire protection, and has its own sewer and water system. Daghlian argues that Ringgold is the more populous community and the clear choice for the allotment of Channel 270A.

5. The Commission's criteria for evaluating conflicting proposals was set forth in *Revision of FM Assignment Policies and Procedures* 90 FCC 2d 88 (1982). Under our listed priorities each community would be considered for a first FM service. Here we note that Ringgold (population 1,882) is a significantly larger community than Dawnville (population 288).[3] Additionally, the proponent for Dawnville has stated her intent to apply for Channel 270A if allotted to Ringgold. Based on these facts we feel it appropriate to allot Channel 270A to Ringgold, Georgia. The transmitter site must be restricted to at least 7.8 kilometers (4.9 miles) east of the city to avoid short spacing to Station WDRM(FM), Decatur, Alabama.

6. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204 and 0.283 of the Commission's Rules, IT IS ORDERED, That effective December 8, 1986, the FM Table of Allotments, Section 73.202(b) of the Rules, IS AMENDED with respect to the community listed below:

City	Channel No.
Ringgold, Georgia	270A

7. The window period for filing applications on this channel will open on December 9 , 1986, and close on January 7, 1987.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Montrose H. Tyree, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Charles Schott
Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Daghlian's reply comments filed April 7, 1986, after the date for filing responses (April 4, 1986). have not been accepted.

[2] Population figures are taken from the 1980 U.S. Census.

[3] The petitioner describes Dawnville as a community of 288 persons (not listed in the Census) located three miles from the intersection of Highways U.S. #76 and Georgia #286 to the North near the southern boundary of the Chatahoochee National Forest.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-50

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (McCook, Nebraska)	RM-5140

REPORT AND ORDER

(Proceeding Terminated)

Adopted: October 7, 1986 Released: October 31, 1986

By the Chief, Policy and Rules Division:

1. The Commission has before it the *Notice of Proposed Rule Making*, 51 Fed. Reg. 6146, published February 20, 1986, proposing the allocation of Channel 230A to McCook, Nebraska, as the community's third local FM service, at the request of Donna Goad ("petitioner"). Supporting comments were filed by the petitioner and by Jerry Kautz ("Kautz"). No oppositions were received.

2. The petitioner and Kautz both support the allocation of additional FM frequencies to McCook, stating that the community is currently underserved and each expressed an intention to apply for the channel, if allocated. Petitioner, however, now requests that a higher powered Class C2 channel be allocated in lieu of the originally proposed Class A. She states that the two existing stations are both Class C and the allocation of a Class C2 channel would lessen market inter-mixture. She also requests that sufficient channels be allocated to accommodate any additional interest in the McCook allotment. Kautz also supports the allocation of a fourth FM channel.

3. Our engineering review shows that Channels 230C2 and 253C2 can be allocated to McCook in compliance with the Commission's minimum mileage separation and other technical requirements. Channel 230C2 does not require the imposition of any site restriction. Channel 253C2 requires a site restriction of 8.0 kilometers (5.0 miles) north to avoid a short-spacing to the proposed allocation of Channel 250 to Colby, Kansas (MM Docket 86-21, 51 Fed. Reg. 4194, published February 3, 1986).

4. We believe the public interest would be served by allocating Channels 230C2 and 253C2 to McCook, Nebraska, since it could provide the community and its environs with its third and fourth FM services and interest in two channels has been expressed. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204 and 0.283 of the Commission's Rules, IT IS ORDERED, That effective December 8, 1986, the FM Table of Allotments, Section 73.202(b) of the Rules, IS AMENDED with respect to the community listed below, to read as follows:

City	Channel No.	
McCook, Nebraska	230C2, 241, 253C2,	287

5. The period for filing applications for Channels 230C2 and 253C2 will open on December 9, 1986, and close on January 7 , 1987.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Charles Schott
Chief, Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket 86-77

Amendment of Sec.73.202(b), Table of Allotments FM Broadcast Stations. (Mattoon, Illinois)	RM-4935

REPORT AND ORDER

(Proceeding Terminated)

Adopted: October 6, 1986 **Released: October 31, 1986**

By the Chief, Policy and Rules Division:

1. The Commission herein considers the *Notice of Proposed Rule Making*, 51 FR 5077, March 17, 1986, which proposed to allot Channel 267A to Mattoon, Illinois, as that community's second FM service. The *Notice* was issued in response to a petition filed by Randall J. and Cathaleen R. Miller ("petitioners "). Supporting comments were filed by the petitioners restating their interest in the Mattoon allotment.

2. We believe that the public interest would be served by adopting the requested proposal. As indicated in the *Notice* , Channel 267A can be allotted to Mattoon, Illinois, consistent with the separation requirements of Sec. 73.207 of the Rules.

3. Accordingly, pursuant to the authority contained in Secs. 4(i), 5(d), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Secs.0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, that effective December 8, 1986, the FM Table of Allotments, Sec. 73.202(b) of the Rules, IS AMENDED with regard to the following community:

City	Channel No.
Mattoon, Illinois	245, 267A

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. For further information concerning this proceeding, contact Montrose H. Tyree, Mass Media Bureau, (202) 634-6450.

FEDERAL COMMUNICATIONS COMMISSION

Charles Schott
Chief, Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-150

Amendment of Sec.73.202(b),	RM-5232
Table of Allotments,	RM-5474
FM Broadcast Stations.	
(Loudon and Oliver Springs,[1] Tennessee)	

REPORT AND ORDER

(Proceeding Terminated)

Adopted: October 15, 1986 Released: October 31, 1986

By the Chief, Policy and Rules Division:

The Commission has before it for consideration the *Notice of Proposed Rule Making*, 51 FR 16076, April 30, 1986, proposing the allotment of Channel 256A to Loudon, Tennessee, at the request of Loudon Broadcasters, Inc. ("petitioner"), licensee of Station WLOD(AM), Loudon. The allotment could provide Loudon with its second FM service. Petitioner filed supporting comments reaffirming its intention to apply for the channel. In response to the *Notice*, Oliver Springs Broadcasting Company ("OSBC") filed comments and a counterproposal suggesting Channel 256A for allotment at Oliver Springs, Tennessee, as a first local FM service, instead of Loudon.[2] Comments were also filed by DeFuniak Communications, Inc., ("DeFuniak") licensee of Station WKJQ(FM), Channel 257A, Jefferson City, Tennessee. Each party filed reply comments.

2. The distance between Loudon and Oliver Springs is less than the 105 kilometers (65 miles) required by the Commission's minimum separation requirements for Class A co-channel allotments. Therefore, in order to satisfy the requests of the petitioner and OSBC, we conducted a channel search to determine if an alternative channel is available for allotment to either Oliver Springs or Loudon. A channel study reveals that Channel 254A is available for allotment at Oliver Springs. We found that Channel 254A can be allotted to Oliver Springs in compliance with the Commission's minimum distance separation requirements, with a site restriction of 9.9 kilometers (6.2 miles) northwest of the city to avoid a short spacing to Station WTFM(FM), Channel 253, Kingsport, Tennessee.

3. DeFuniak requests that a site restriction be imposed on the new allotment at Loudon, so as to preclude any short spacing to its proposed transmitter site.[3] Channel 256A can be allotted to Loudon consistent with the Commission's minimum distance separation requirements with a site restriction of 3.5 kilometers (2.1 miles) northeast of Loudon to avoid a short spacing to Station WAHR(FM), Channel 256, Huntsville, Alabama. We find that the Loudon proposal will meet the minimum distance separation requirements to the license and application sites for Station WKJQ(FM).

4. We believe the public interest would be served by the allotment of Channel 256A to Loudon, Tennessee and Channel 254A to Oliver Springs, Tennessee, in order to provide a second FM service to Loudon and a first FM service to Oliver Springs. Accordingly, pursuant to the authority contained in Secs. 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Secs.0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective December 8, 1986, the FM Table of Allotments, Sec.73.202(b) of the Commission s Rules, IS AMENDED for the following communities:

City	Channel No.
Loudon, Tennessee	256A, 287A
Oliver Springs, Tennessee	254A

5. The window period for filing applications will open on December 9, 1986, and close on January 7 , 1987.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Charles Schott
Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] This community has been added to the caption.

[2] Public Notice of the acceptance of the counterproposal was given on September 10, 1986, Report No. 1617.

[3] DeFuniak filed an application to change its transmitter site (BPH860616IA)

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-405

Flexible Operational and Licensing Procedures for the Broadcast Auxiliary Services, Part 74, Subparts D, E, F, and H; and the Cable Television Relay Service, Part 78.

NOTICE OF INQUIRY

Adopted: October 16, 1986; Released: November 4, 1986

By the Commission:

1. The Commission, on its own motion, initiates this proceeding to review the rules concerning the operational and licensing requirements for remote pickup stations, aural broadcast auxiliary stations, television broadcast auxiliary stations, low power auxiliary stations, and cable television relay stations.[1] These stations transmit program material and communications related to program production.

2. Demand for Broadcast Auxiliary Service (BAS) spectrum has sharply increased in recent years, which has led to increased sharing of that spectrum. As a result, BAS users in many areas of the country have formed voluntary local frequency coordinating committees (LFCCs) to promote licensee interaction and cooperation. Close coordination among users has achieved more effective use of the limited auxiliary spectrum.

3. Success of existing BAS frequency coordination programs, particularly in relation to mobile operations where real-time coordination is necessary, persuades us to consider relaxing the rules to provide more flexible licensing procedures. We believe that simplified filing and licensing requirements would yield substantial benefits to BAS users and to the Commission. In particular, there would be a reduction in the paperwork now required in the BAS licensing process. Accordingly, we are soliciting comments and suggestions on the following discussion.

4. We suggest that all eligible BAS users be issued blanket authority for *mobile or portable operation* on any frequency in bands they are permitted to use, rather than being licensed for specific frequencies.[2] Thus, most mobile or portable operations could be initiated or modified at the local level without the need for further Commission authorization. This would eliminate the filing and processing of what now has become rote paperwork and remove the attendant delays.

5. Specifically, we are considering extending the concepts embodied in §74.24 and §74.604 to allow mobile or portable operation in bands the station is eligible to use. This would be under a blanket authorization for Part 73 broadcast stations or by special licenses issued to other eligible users such as networks and cable entities. Mobiles and portables would operate co-equal to each other but would be secondary to fixed operations such as studio to transmitter (STL) links. Because fixed stations require a much greater degree of certainty regarding availability of channels we would plan to continue to license them only for specific facilities and upon application review by the Commission.

6. Proper frequency selection and resolution of interference depends upon the prompt exchange of pertinent operational information among users. This includes prior notification to all potentially affected co-channel users of intended new operations. Frequency coordination is therefore considered essential to effective use of the BAS frequencies, especially in congested areas where stations must share channels. Frequency coordination may easily be accomplished by formation of groups of volunteers to act as frequency coordinators[3] in a manner similar to a procedure adopted in the amateur radio service.[4] In fact, BAS users have already formed coordination groups that serve as clearing houses for information regarding local spectrum usage. Their knowledge of local conditions has been relied on to assist in new frequency assignments, coordinate mobiles and portables on a real-time basis, and to help locate interfering signals. Under this approach, stations repeatedly found to be causing interference and which do not make timely notifications and show proper regard for other operations would be subject to appropriate sanctions.

7. We are seeking comments and suggestions on the discussion above as well as possible alternatives. Specifically, we pose the following questions: How can itinerant operations be accommodated without disruption to ongoing service, especially on short notice or during nonbusiness periods? Should local mobile or portable stations (i.e., within 50 miles of its studio or transmitter) be given priority over out-of-town operations? Should a universal repeater calling frequency to accommodate real-time coordination and interference resolution be established? If so, what frequency pair is appropriate? What provisions should be made to ensure integrity of the local data bases? Which BAS bands could this procedure be applied to?

Comments and Replies

8. Pursuant to applicable procedures set forth in 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before December 4, 1986 and reply comments on or before December 19, 1986. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and five copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W. 20554.

Actions

9. Authority for the actions taken herein is contained in Sections 4(i) and 303(r) of the Communications Act of 1935, as amended.

10. Further information on this proceeding may be obtained by contacting Hank VanDeursen, Mass Media Bureau, (202) 632-9660.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

FOOTNOTES

[1] *See also Memorandum Opinion and Order* in Rule Making No. RM-5179 (adopted October 16, 1986).

[2] Certain limitations involving international treaties and shared bands would be retained.

[3] To avoid duplicative efforts and unnecessary conflict, we would expect any given area to have only one coordinator. The local coordinator would then be considered the individual or entity recognized and relied upon for frequency coordination by the majority of eligible BAS users in that area.

[4] *See Report and Order* in PR Docket No. 85-22, FCC 86-201, 51 FR 17342, May 12, 1986 (adopted April 21, 1986).

Before the
Federal Communications Commission
Washington D.C. 20554

MM Docket No. 83-1094

MARGARET J. HANWAY File No. BPH-820510AL
Fairmont, West Virginia

For Construction Permit
for a New FM Station

ORDER

Adopted: October 24, 1986; Released: November 4, 1986

By the Commission:

1. Before the Commission are: (1) Margaret J. Hanway's Application for Review filed March 25, 1986; (2) Mass Media Bureau's Comments in Support of Margaret J. Hanway's Application for Review filed April 9; and (3) a Motion to Reopen Record filed March 25 by Margaret J. Hanway. These pleadings concern a Decision of the Review Board denying Margaret J. Hanway's application for a new FM radio station at Fairmont, West Virginia without prejudice to her refiling and requesting a waiver of the one year waiting requirement of Section 73.3519(a) of the Commission's Rules. [1]

2. IT IS ORDERED, That good cause having been shown the Motion to Reopen Record filed March 25, 1986 by Margaret J. Hanway IS GRANTED. [2]

3. IT IS FURTHER ORDERED, That pursuant to Section 1.115(g) of the Commission's Rules, Margaret J. Hanway's Application for Review filed March 25, 1986 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

FOOTNOTES

[1] Margaret J. Hanway, 59 RR 2d 1296 (Rev. Bd. 1986). The Board found that Mrs. Hanway had been involved in an abuse of the Commission's processes. The Board did not disqualify Mrs. Hanway outright because it found that the misconduct was prompted more by the ineptitude of Mrs. Hanway's attorney-husband than by any malice on her part. Accordingly, any refiling should be accompanied by a statement indicating what actionsoutrig will be taken to ensure that no further misconduct will occur. The statement should also provide assurance that Mr. Hanway will not be involved with the refiled application or the proposed station. Cf. Faulkner Radio, Inc., 88 FCC 2d 612, 618 (1981).

[2] This unopposed pleading seeks to rectify the inadvertent omission of a hearing exhibit from the record.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

N.E.O. BROAD-CASTING COMPANY Geneva, Ohio	MM Docket No. 83-1180 File No. BPH-811201AI
Donald E. Martin d/b/a RAY-MAR BROAD-CASTING COMPANY Geneva, Ohio	MM Docket No. 83-1181 File No. BPH-820624BK

For construction permit for a new FM Station

ORDER

Adopted: October 24, 1986; Released: November 4, 1986

By the Commission:

1. The Commission has before it: (a) an Application for Review of the Review Board's Decision in this proceeding, FCC 86R-18, 103 FCC 2d 1031, released April 4, 1986, filed by N.E.O. Broadcasting Company on May 5, 1986, and (b) an Opposition and Request for Expedited Action filed by Donald E. Martin d/b/a Ray-Mar Broadcastng Company on May 20.

2. IT IS ORDERED, That pursuant to Section 1.115(g) of the Commissions' Rules, the above-described Application for Review filed May 15, 1986, by N.E.O. Broadcasting Company IS DENIED.

FEDERAL COMMUNICATIONS COMMISSSION

William J. Tricarico
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

FM Transmitter Site Map Submissions
Required by FCC Forms 301 and 340

MEMORANDUM OPINION AND ORDER

Adopted: October 24, 1986 Released: November 4, 1986

By the Commission:

1. Applicants for AM, FM and TV station construction permits have long been required by FCC Forms 301 and 340 to submit a 7.5 minute series U.S. Geological Survey ("USGS") Topographic Quadrangle map specifying the proposed antenna and transmitter site.[1] Specifically, these forms require that this map show: (i) the proposed transmitter location accurately plotted with the latitude and longitude lines clearly marked and showing a scale of statute miles and (ii) the transmitter location and call letters of all AM, FM and TV broadcast stations within two miles of the proposed antenna location.[2]

2. Pursuant to a Commission *Public Notice*, Mimeo 3693 (released April 5, 1985), applicants for FM station construction permits, unlike applicants for other broadcast services, thereafter were required to submit either the entire full scale 7.5 minute map, or a legible photocopy thereof, containing at least two USGS coordinate markings, one on either side of the marked site, placed along the printed margins of both axes. If, however, the provision of a full scale map or photocopy was "inconvenient", the *Public Notice* provided that the applicant could submit a reduced topographic map so long as it was accompanied by a full scale copy of the section of the map containing the site. Finally, the *Public Notice* stated that applications which failed to comply with one of these alternative requirements would be returned without further review. Thereafter, in adopting the "hard look" approach to the processing of FM applications, the Commission indicated that in order to be deemed sufficient for tender, an application must, among other things, be accompanied by a transmitter site map as described in the April 5, 1985 *Public Notice*. *Report and Order* in Docket 84-750, 50 Fed. Reg. 19936, 19945 (Appendix D) (May 13, 1985). The specific contents of the *Public Notice* were not, however, contained in either the text or Appendices of the *Report and Order*.

3. As a practical matter, the information called for in the *Public Notice* has always been needed by the staff to verify fundamental and critical information contained in the application. *See* note 1, *supra*. However, prior to adoption of the *Public Notice*, applicants were allowed to submit photocopies of *any* portion of the 7.5 minute map containing the proposed site without reference to any requirement that *pre-printed* axes must be photocopied from original USGS maps. Applications which did not contain a transmitter site map whose accuracy could be independently verified by the staff were held in abeyance until the applicant furnished any necessary information by amendment. Recognizing the significant processing delays caused by this practice and anticipating a marked increase in the number of FM applications as a result of BC Docket 80-90, the *Public Notice* was designed to eliminate any confusion as to what was required in a transmitter site map and thereby facilitate processing of all applications.

4. Section 552(a)(1)(C) and (D) of the Administrative Procedure Act, 5 U.S.C. § 552 (a)(1)(C) and (D), requires that the Commission ".separately state and.publish in the Federal Register.rules of procedure.[and] substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretation of general applicability formulated and adopted by the agency." It is well settled that an agency "regulation imposing specific obligations upon outside interests in mandatory terms,.is required to be published in the Federal Register *in its entirety*, or in the alternative, to be both reasonably available and incorporated by reference with the approval of the Director of the Federal Register". *Appalachian Power Company v. Train*, 556 F.2d 451, 455 (1977). (emphasis added) See also 5 U.S.C. § 552(a)(1).[3] The District of Columbia Circuit Court of Appeals has held in *Rochelle C.Salzer v. FCC*, 778 F.2d 869 (D.C. Cir. 1985), that the mere summarization of new form requirements in the Federal Register, without publication of a new or supplemental form therein, did not constitute adequate notice to pending applicants for low power television construction permits that they were thereafter required to file appropriate amendments to comply with those new form requirements. As stated in *Salzer* :

> The *quid pro quo* for stringent acceptability criteria is explicit notice of all application requirements: "[w]hen the sanction is as drastic as dismissal without any consideration whatever of the merits, elementary fairness compels clarity in the notice of the material required as a condition for consideration." [*Radio Athens, Inc.* (*WATH*)*v. FCC*, 401 F.2d 398, 404 (D.C. Cir. 1968)]. The less forgiving the FCC's acceptability standard, the more precise its requirements must be. (Footnote omitted quoting *Bamford v. FCC*, 535 F.2d 78, 82 (D.C. Cir.), *cert. denied*, 429 U.S. 895 (1976)).

Id. at 875.

5. In view of the foregoing, it is clear that incorporation by reference in the Federal Register did not constitute adequate notice of the contents of the *Public Notice*. Therefore, it would not be proper to impose the requirements set forth in that *Public Notice* upon applicants who were not provided adequate notice thereof. Accordingly, as to all applicants who have preserved their rights at various levels of appeal, applications which were returned for failure to comply with the requirements in the *Public Notice* shall be reaccepted *nunc pro tunc*.[4]

However, in the interest of administrative finality, such treatment will not be afforded those applicants whose applications contained defective transmitter site maps but who failed to preserve their rights on appeal. "A reversal on appeal does not inure to the benefit of those who did not join in the appeal, although it may control subsequent actions on the part of the Commission." *Windber Broadcasting Company*, 44 FCC 2790 (1962). Those applicants who did not protest the staff's action returning their applications have failed to avail themselves of prescribed administrative procedures to protect their rights

and, therefore, should not now be permitted to disrupt the processing or final decision in proceedings involving applications for the same frequencies.

6. Accordingly, IT IS ORDERED That, as to all applicants who have preserved their rights at various levels of appeal, the staff is directed to reinstate *nunc pro tunc* those applications returned for failure to comply with the requirements of the *Public Notice*.[5]

7. IT IS FURTHER ORDERED That, given the necessity of the information called for in the *Public Notice* and in order to avoid further delay in the processing of FM applications, the requirements set forth in the *Public Notice*, Mimeo 3693 (released April 5, 1985), appended hereto, shall be effective seven days after publication in the Federal Register.

8. Finally, we take this opportunity to note that submission of the *entire*, original 7.5 minute map has always been acceptable. We emphasize that this practice continues to be acceptable and is, in fact, the best method of accurately indicating transmitter and antenna site data. Accordingly, we encourage all applicants, where possible in the future, to submit the entire 7.5 minute map.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

APPENDIX

PUBLIC NOTICE

April 5, 1985

FCC CLARIFIES TRANSMITTER SITE MAP REQUIREMENTS

This notice is part of the Commission's continuing effort to expedite the processing of FM applications in order to bring new broadcast service to the public as rapidly as possible.

When applying for an FM station construction permit, one of the submissions required by FCC forms 301 and 340 is a 7.5 minute series U.S. Geological Survey topographic quadrangle map upon which is marked the transmitter site.

In order to allow the Commission's processing staff to verify the correctness of the geographic coordinates provided in an application, it is necessary for this site map to show along the printed margin of both axes at least two coordinate markings, specifically labeled by the USGS, one on either side of the marked site. Additionally, a scale of kilometers or miles (kilometers, if available) and all of the identifying map information must be included. The site should be plotted on a full scale map, and all of the contour lines must be clearly visible. Faded, smudged or otherwise illegible maps are unacceptable. Photocopies are acceptable in lieu of actual USGS Maps, provided they are clear, dark and legible. It is not necessary to submit an entire map, (although this is perfectly acceptable) but only as much as it necessary to fully comply with the requirements described above.

In certain cases it may be inconvenient to provide a full scale photocopy which includes both the site and the margins. This can occur when the site lies towards the center of the map. In this case the following alternative is acceptable. Provide a full scale copy of the section of the map containing the site. This copy must include either four of the standard printed cross-marks or one margin and two cross-marks. Fine lines should be drawn between the marks in such a fashion as to enclose the site. Each of these lines should be labeled with the appropriate latitude or longitude. This full scale map section must include all the information specified in the previous paragraph. In addition, a reduced copy of the entire map must be included to allow the Commission's staff to verify that the lines have been correctly labeled.

If the above requirements are not met, the application will be returned without further review. Prospective applicants should understand that the Commission cannot process an application to grant without being able to verify the correctness of the site elevation and site coordinates. These coordinates serve as the reference point for all calculations of spacing, coverage and interference.

Questions concerning the above should be directed to Bob Greenberg, FM Branch, (202) 632-7166.

FOOTNOTES

[1] This information enables the staff to verify the stated geographic coordinates of the proposed site, the presence of other nearby comunications facilities and/or obstructing terrain (*See* 47 C.F.R. § 73.315), and the ground elevation of the transmitter site. This final value is paramount in determining radiation center heights above ground and mean sea level from which, with other data, antenna height above average terrain is derived. FM site data is also used for the purpose of air safety approval, environmental analyses, the determination of proper spacing and the licensing of other co-located communications services.

[2] *See e.g.* FCC Form 301 (January 1982 and April 1985) Item V-A, Item 11 (AM); Section V-B, Item 13 (FM); and Section V-C, Item 13 (TV).

[3] The regulations of the Office of the Federal Register pertaining to incorporation by reference are found in 1 C.F.R. Part 51. § 51.7 requires that each incorporation by reference include an identification and subject description of the matter incorporated. A brief description is required to inform the user of the potential need to refer to the material incorporated. Under § 51.3 the approval of the Director for incorporation by reference shall only be granted when the material is eligible, its incorporation will substantially reduce the volume of material published in the Federal Register, the material is sufficiently available to afford fairness and uniformity, and the incorporating document is drafted and submitted for publication in accordance with the applicable regulations. The above requirements were not followed in the present case.

[4] We note that with regard to two applications which also contain additional tenderability defects, the Commission has affirmed the action of the staff in dismissing those applications for reasons stated in two separate *Memorandum Opinion and Orders* adopted this day. These applications are: Joanne Brehm, Channel 265A, Apalachicola, Florida (BPH-850709MV) and Matthew D. Wiggins, Channel 288A, Apalachicola, Florida (BPH-850709MU).

[5] All applications pending as of the effective date of this *Memorandum Opinion and Order* that do not comply with the requirements for FM transmitter site maps set forth in the

attached Appendix shall be retained and the applicants will be permitted to amend their applications to correct this deficiency only.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

MUTUAL RADIO OF NEW YORK, INC.

(assignor) and

DOUBLEDAY
BROADCASTING COMPANY BAL-841005FG

(assignee)

For Assignment of License of Station
WHN, New York, New York

MEMORANDUM OPINION AND ORDER

Adopted: October 24, 1986 Released: November 4, 1986

By the Commission:

1. The Commission has before it for consideration, an application for review, filed by Anthony R. Martin-Trigona, of the grant of the assignment of license of AM Station WHN, New York, New York, from Mutual Radio of New York, Inc. ("Mutual" or "licensee") to Doubleday Broadcasting Company ("Doubleday"). Both Mutual and Doubleday have opposed the instant application for review.

2. Mr. Martin-Trigona, in his original petition to deny the WHN assignment of license, had claimed that he was in an ongoing dispute with Mutual concerning its alleged racially discriminatory and anticompetitive conduct while in control of WHN(AM). He also maintained that Mutual sought to restrict the proposed licensee's programming discretion. Finally, he incorporated by reference his allegations involving Mutual's operations as a prior licensee of Station WCFL(AM), Chicago, Illinois. *Appeal dismissed sub nom. Martin-Trigona v. FCC.*, No. 84-1229 (D.C. Cir. August 25, 1986). After examination of these allegations and responses, the Commission's staff noted that the petitioner's pleading was procedurally deficient. Nevertheless, the staff considered the merits of his arguments and concluded that they raised no substantial and material questions of fact regarding Mutual's qualifications to continue as a Commission licensee. In view of these conclusions, the assignment application was granted.

3. In his application for review, Mr. Martin-Trigona raises the identical substantive issues that were raised in his original pleading. These were dealt with and disposed of by the staff in its original letter (See Attachment). In this regard, we affirm the Bureau's action.

4. Accordingly, the application for review filed by Mr. Martin-Trigona against the grant of the assignment of license of AM Station WHN, New York, New York, from Mutual Radio of New York, Inc. to Doubleday Broadcasting Company IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

ATTACHMENT

Mr. Anthony R. Martin-Trigona
P. O. Box 2002
New York, New York 10185-2002

Dear Mr. Martin-Trigona:

This is in reference to the "petition to deny", filed by you on October 29, 1984, in which you request that the Commission deny the application for assignment of license of AM Station WHN, New York, New York, from Mutual Radio of New York, Inc. ("Mutual or licensee"), to Doubleday Broadcasting Company, Inc. (BAL-841005FG).

You claim standing to submit the petition on the grounds that you listen to the station when you are in New York. You object to the grant of the application because you are involved in an "ongoing dispute" with Mutual concerning its alleged racially discriminatory and anti-competitive conduct while in control of WHN(AM). You maintain that Mutual seeks to restrict the proposed licensee's programming discretion. You also point to and incorporate by reference prior allegations made by you involving Mutual's operation as prior licensee of Station WCFL(AM), Chicago, Illinois. Those matters, you contend, are presently before the Court of Appeals. *Anthony Martin-Trigona* v. *FCC*, Case 84-1229, U.S. Court of Appeals (D.C. Cir.).

In its opposition to your petition, Mutual contends that your allegations concerning the operation of WCFL have already been considered and rejected by the Commission. *Mutual Radio of Chicago, Inc.*, 55 RR 2d 1577 (1984). Next, Mutual notes that while the proposed licensee will assume an existing affiliation agreement, no evidence has been submitted to show any abuse of the Commission's rules and policies regarding restricting the assignee's programming. Thus, absent more specific and detailed allegations of fact or legal analysis, Mutual argues, the instant pleading must be denied.[1]

Initially, we note that you cannot claim standing. While you contend that you are a listener of WHN, that alone is not sufficient to establish standing. Moreover, you have not established that a grant of this application would result in, or be reasonably likely to result in, some injury of a direct, tangible or substantial nature. *Telesis Corp.*, 43 RR 2d 612 (1978); *WGAL Television Corp.*, 13 RR 2d 1131 (1968). Also, the allegations set forth in your pleading are not supported by an affidavit of a person with personal knowledge thereof. *See KHVH Inc.*, 77 FCC 2d 890 (1980). In view of these deficiencies, your pleading of October 29, 1984 cannot be considered as a petition to deny within the meaning of Section 309(d)(1) of the Communications Act of 1934, as amended. Nevertheless, the allegations set forth in your petition have been treated as an informal objection to a grant of the WHN assignment application pursuant to Section 73.3587 of the Commission's Rules.

In the instant pleading, you incorporate by reference all allegations pertaining to Mutual's qualifications as a licensee which you previously raised in your pleadings against the assignment of the WCFL license. However, the Commission in *Mutual Radio of Chicago, Inc., supra,* determined that those allegations raised no substantial and material questions of fact regarding Mutual's qualifications to continue as a Commission licensee. Moreover, none of those allegations relate specifically to the proposed WHN(AM) transaction. In addition, your allegations concerning Mutual's abuse of the assignee's programming discretion are not specific. Hence, no future inquiry is warranted.

Accordingly, your "petition to deny" filed on October 29, 1984, is dismissed, and when considered as an informal objection, is denied. Upon finding that the applicant is fully qualified and that a grant of the assignment will serve the public interest, convenience and necessity, the Chief, Mass Media Bureau, pursuant to delegated authority, has this day granted the above-referenced assignment application.

Sincerely,

Larry D. Eads
Chief, Audio Services Division
Mass Media Bureau

cc: Ian D. Volner, Esquire
John W. King, Esquire

FOOTNOTES

[1] Mutual also notes that it is not involved in an "ongoing dispute" with Mr. Martin-Trigona since the District Court rejected his arguments. *See In re Martin - Trigona,* 575 F. Supp. 1245 (Conn. 1983) *aff'd in part* 737 F. 2d 1254 (2nd Cir. 1984).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-264

A Review of Section 73.1690
Regarding Modifications of
Broadcast Transmitters

REPORT AND ORDER

(Proceeding Terminated)

Adopted: October 24, 1986; Released: November 4, 1986

By the Commission:

INTRODUCTION

1. The Commission has before it a *Notice of Proposed Rule Making (Notice)*, and the comments filed in response thereto, concerning the rules and regulations applicable to broadcast licensees who modify their FCC authorized transmitters. [1]

BACKGROUND

2. Section 73.1690 of the Commission's Rules contains procedures licensees are to follow when making modifications to their transmitting facilities. Some equipment changes such as transmitter circuitry, antenna height and location, etc., require prior FCC authorization. This is obtained by applying for a construction permit using FCC Forms 301 or 340. Other modifications may already be made without prior authorization, including transmitter or antenna replacement without change in operating power or location. The *Notice* proposed further relaxation of the procedures required for any electrical or mechanical modifications to transmitter circuitry. For example, some TV licensees converting to stereo sound have found it necessary to make minor electrical changes to their aural transmitter to facilitate the installation. Such changes, even though minor, now require filing for a construction permit and awaiting Commission approval before completing the stereo conversion.

3. Because broadcasters have the continuing responsibility to ensure that their equipment is operating properly, it was proposed to remove the FCC filing requirement and to allow electrical and mechanical modifications to transmitters without Commission authorization. To satisfy interference concerns, it was also proposed to require tests on the modified equipment and to require retention of the results at the transmitter site.

4. Comments supported the premise of the *Notice* but did take issue, in some instances, on how best to achieve the intent of the proceeding. [2] Specifically, the following issues were raised.

1. What tests are necessary to ensure that interference is not increased?

2. What documentation concerning the modification, if any, should be required to be retained by the licensee?

3. Should modifications that facilitate the conversion to AM stereo be permitted without prior authorization?

These issues will be discussed below.

ISSUE 1: REQUIRED TESTS

5. The *Notice* proposed that after a modification to the transmitter is completed, the licensee conduct certain tests to show compliance with applicable Commission rules. The proposed tests are those currently required to gain an FCC issued equipment authorization known as type acceptance or notification. Type acceptance and notification are programs geared to the manufacturers of communications equipment to ensure that the sale and distribution of potentially interference-causing transmission equipment is prevented. The tests necessary for equipment authorization involve the measurement of the RF power output, modulation characteristics, occupied bandwidth, spurious emissions at the antenna terminals, field strength of spurious radiation, and frequency stability, under various environmental conditions.

6. In its comments, NAB stated that these tests would be excessively burdensome to perform. NAB added that this burden, and the burden of documentation, could deter licensees from making suggested or recommended equipment improvements, or from implementing new technology circuit designs. Finally, NAB noted that the proposed rule would actually increase burdens in some cases. It cited several modifications which currently require only equipment performance tests upon completion. Under the proposed rules, these modifications would require the more complicated type acceptance tests.

7. Clearly, the tests as proposed would satisfy any interference concerns, but, upon reflection, we agree that they may be overly stringent for field modifications of a transmission system. The tests are a good tool to ensure that an entire line of communications equipment meets the Commission's minimum level of interference protection. However, once the equipment is purchased, the broadcaster has operating regulations (i.e. power determinations, suppression of spurious emissions, modulation limits, etc.) that ensure the same end.

8. Therefore, we agree that the proposed test requirement in the *Notice* is excessively burdensome. Traditional equipment performance measurements related to spurious and harmonic emissions are more suitable in the broadcast station environment and will similarly assure that additional interference will not be caused by the modifications. Further, we can rely on other operational requirements which licensees must continually meet to control interference.

ISSUE 2: RETENTION OF RECORDS

9. The *Notice* proposed that the results of the tests performed subsequent to the modification be retained at the transmitter site for as long as the modified equipment is used. NAB objected to this proposal, stating that this new requirement would be contrary to the Commission's deregulatory efforts. NAB further stated that such record keeping is clearly in the interest of the licensee absent any regulations.

10. By requiring only equipment performance tests instead of type acceptance tests, the concerns of NAB are largely addressed. The documentation required for equipment performance tests is much less formal than that for type acceptance tests. Further, instead of retaining these results for the life of the transmitter, as was proposed, results of equipment performance tests only need to be retained for two years.

11. We do believe, however, that licensees should retain a simple and basic description or diagram describing the modification. This provides prospective users of the modified equipment with critical information. If no such information exists, any future problems could prove difficult to solve, and could result in interference or lack of service for long periods of time. We believe that whatever minimal burden this requirement imposes upon licensees is outweighed by the benefits (less "downtime") and by the overall reduction of testing and paperwork burdens contained in this rule revision.

ISSUE 3: AM STEREO

12. The most controversial aspect of the *Notice* concerned the installation of AM stereophonic exciters. Motorola, NBC, and NAB all objected to the proposed rules which would have required the filing of FCC Form 301 when interconnecting an AM stereo exciter to an AM transmitter. NBC disputed the statement in the *Notice* that the Commission does not have sufficient experience with AM stereo to make changes at this time. NBC pointed out that there are over twice as many AM stereo stations than there are TV stations providing stereo sound, yet the latter conversion was proposed for deregulation. Further, Motorola pointed out that AM stereo conversions are already permitted under the Commission's Rules, with licensees required only to perform equipment performance measurements. Thus, the proposal of the *Notice* concerning the installation of AM stereo exciters would be more restrictive than the current requirements.

13. Upon review, we agree that the proposed rules regarding AM stereo were contrary to the intent of this proceeding. We see no reason to exclude from the scope of this proceeding the interconnection of type accepted AM stereophonic exciters to a AM transmitter. Therefore, the rules adopted here are crafted to permit this modification without Commission authorization. This is present Commission policy and, thus, merely maintains the status quo.

14. An additional issue, however, is whether modifications to type accepted AM stereo exciters should be deregulated. The concern about AM stereo in this proceeding results from the fact that frequency determining and bandwidth limiting circuits are contained in the exciter itself. This is why AM stereo exciters have remained under the type acceptance equipment authorization program while most other broadcast equipment has been placed in the less stringent program known as notification. It is also why the Commission, through its Mass Media Bureau, released a Public Notice on August 9, 1984, cautioning AM licensees from making unauthorized modifications to their stereo exciters which could void the units' type acceptance.

15. The Public Notice referenced above cautioned licensees from removing audio frequency filters incorporated in the original equipment by the manufacturer. This action, according to the Public Notice, may cause excessive sideband signals in adjacent channels which may subject the station licensee to forfeiture sanctions. However, this may be said about other modifications to transmission equipment which will be permitted by this action. This proceeding is based on the precept that licensees have the continuing responsibility to ensure that they are operating in accordance with the Commission's Rules and not causing interference. We see no reason why this logic would not include modifications of AM stereo exciters. Therefore, any electrical or mechanical modification to broadcast transmission equipment, including AM stereo exciters will be permitted without prior Commission approval.

16. REGULATORY FLEXIBILITY ACT FINAL ANALYSIS

I. *Need and purpose of this action* :

The Commission revises the rules regarding broadcast transmitter modifications to reduce the regulatory burdens on broadcast station licensees.

II. *Summary of issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis* :

No comments were received in response to the Initial Regulatory Flexibility Analysis.

III. *Significant alternatives considered and rejected* :

The Commission considered all alternatives presented in response to the *Notice*, as reflected in the adopted decision. The commenters offered three alternatives to the proposals of the *Notice*. These were: 1) establish less burdensome equipment tests, 2) do not require the retention of test data, and 3) include AM stereo under the scope of the new rules. The Commission adopted suggestions 1 and 3. The decision to adopt the retention of data requirement was made because some information would be necessary for possible future users of the equipment to fully understand the modified equipment. However, the amount of information to be retained is much less than that originally proposed.

This item will not have a negative impact upon small entities and, in fact, should prove beneficial to licensees of smaller broadcast stations. It removes the necessity of filing potentially costly forms and, further, removes the cost of waiting for a Commission response.

17. The Secretary shall cause a copy of this *Report and Order*, including the Final Regulatory Flexibility Analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with Paragraph 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. 601 *et seq.*, (1981)).

Paperwork Reduction Act Statement

18. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to decrease the information collection burden which the Commission imposes on the public. This reduction in information collection burden is subject to approval by the Office of Management and Budget as prescribed by the Act.

Actions

19. Accordingly, IT IS ORDERED THAT pursuant to the authority contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, that Parts 2 and 73 of the Commission's Rules ARE AMENDED, effective December 12, 1986 as set forth in the Appendix below.

20. IT IS FURTHER ORDERED THAT this proceeding IS TERMINATED.

21. Further information on this proceeding may be obtained by contacting Michael A. Lewis, Mass Media Bureau, (202) 632-9660.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

APPENDIX

Title 47 CFR Parts 2 and 73 are amended as follows:

PART 2 – FREQUENCY ALLOCATIONS AND RADIO TREATY MATTERS; GENERAL RULES AND REGULATIONS

1. The authority citations for Parts 2 and 73 continue to read as follows:

AUTHORITY: 47 U.S.C. 154 and 303.

2. 47 CFR 2.977 is amended by adding new paragraph (d) to read as follows:

§2.977 Changes in notified equipment.

* * * * *

(d) Notwithstanding the provisions of this section, broadcast licensees or permittees are permitted to modify notified transmitters pursuant to §73.1690 of the FCC's Rules.

3. 47 CFR 2.1001 is amended by adding new paragraph (l) to read as follows:

§2.1001 Changes in type accepted equipment.

* * * * *

(l) Notwithstanding the provisions of this section, broadcast licensees or permittees are permitted to modify type accepted equipment pursuant to §73.1690 of the FCC's Rules.

PART 73 – RADIO BROADCAST SERVICES

4. 47 CFR 73.127 is amended by revising paragraph (f) to read as follows:

§73.127 Use of multiplex transmission.

* * * * *

(f) Installation of the multiplex transmitting equipment must conform with the requirements of §73.1690(e).

5. 47 CFR 73.1225 is amended by revising paragraphs (c) and (d) in their entirity, and by removing paragraph (e) to read as follows:

§73.1225 Station inspections by FCC.

* * * * *

(c) The following records shall be made available by all broadcast stations upon request by representatives of the FCC.

(1) Equipment performance measurements required by §§73.1590 and 73.1690.

(2) The written designations for chief operators and, when applicable, the contracts for chief operators engaged on a contract basis.

(3) Application for modification of the transmission system made pursuant to §73.1690(c).

(4) Informal statements or drawings depicting any transmitter modification made pursuant to §73.1690(e).

(5) Station logs and special technical records.

(d) Commercial and noncommercial AM stations must make the following information also available upon request by representatives of the FCC.

(1) Copy of the most recent antenna or common-point impedance measurements.

(2) Copy of the most recent field strength measurements made to establish performance of directional antennas required by §73.151.

(3) Copy of the partial directional antenna proofs of performance made in accordance with §73.154 and made pursuant to the following requirements:

(i) §73.68, Sampling systems for antenna monitors.

(ii) §73.69, Antenna monitors.

(iii) §73.61, AM directional antenna field strength and proof of performance measurements.

6. 47 CFR 73.1660 is amended by revising paragraphs (b) and (d) to read as follows:

§73.1660 Acceptability of broadcast transmitters.

* * * * *

(b) A permittee or licensee planning to install and use as a main transmitter one not included on the FCC's "Radio Equipment List" must obtain authority to use such a transmitter by filing for a construction permit on FCC Form 301 (FCC Form 340 for noncommercial educational stations). The application must include a complete description and circuit diagram of the transmitter, description of the carrier frequency determining circuits, complete operating parameters, and measurement data as would be required for a grant of type acceptance. A permittee or licensee planning to modify a transmitter which is included on the FCC's "Radio Equipment List" or for which an FCC Form 301 has been submitted and approved, must follow the requirements contained in §73.1690.

(c) * * *

(d) AM stereophonic exciter-generators for interfacing with type accepted or notified AM transmitters may be type accepted upon request from any manufacturer by the procedures described in Part 2 of the FCC Rules. Broadcast licensees may modify their type accepted AM stereophonic exciter-generators in accordance with §73.1690.

7. 47 CFR 73.1690 is amended by revising paragraph (e), by removing paragraphs (b)(1), (b)(2), (e)(1) (e)(2), (e)(3), (e)(4), (e)(5), (e)(6), and (e)(7), and by redesignating paragraphs (b)(3), (b)(4), and (b)(5) as (b)(1), (b)(2), and (b)(3) respectively to read as follows:

§73.1690 Modification of transmission systems.

* * * * *

(e) Any electrical and mechanical modification to authorized transmitting equipment that is not otherwise restricted by the preceeding provisions of this section, may be made without FCC notification or authorization. Equipment performance measurements must be made within ten days after completing the modifications (See §73.1590). An informal statement, diagram, etc. describing the modification must be retained at the transmitter site for as long as the equipment is in use.

FOOTNOTES

[1] *See Notice of Proposed Rule Making*, MM Docket No. 86-264, FCC 86-297, 51 FR 24409, July 3, 1986 (adopted June 19, 1986).

[2] Comments were filed by Radio Telecom and Technology, Inc. (RTT), CBS Inc. (CBS), the National Association of Broadcasters (NAB), Motorola, Inc. (Motorola), and the National Broadcasting Company, Inc. (NBC).

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of

ROBERT D. FRANKFORT, ESQ.
FOIA Control No. 86-107
On Request for Inspection of Records

MEMORANDUM OPINION AND ORDER

Adopted: October 27, 1986; Released: November 4, 1986

By the Commission:

1. The Commission has before it an Application for Review filed by Robert D. Frankfort, Esq., seeking review of an August 6, 1986 initial ruling by the Chief, Common Carrier Bureau, that denied, in part, Mr. Frankfort's Freedom of Information Act (FOIA) request. By that request, Mr. Frankfort sought access to the following records related to the Commission's regulation of the so-called "Dial-A-Porn" services:

a) All written complaints concerning Dial-A-Porn, Dial-A-Porn messages, or Dial-A-Porn providers received from complainants or memorandum or other documentation reducing to writing any such complaint;

b) All correspondence of the Federal Communications Commission directed to Dial-A-Porn providers directing such provider to respond to complaints pursuant to 47 U.S.C. 223(b)(4)(A) and (b)(4)(B);

c) All responses of Dial-A-Porn providers to the correspondence set forth in (b) above;

d) All notices of apparent liability issued by the Federal Communications Commission to Dial-A-Porn providers;

e) All references for prosecution directed by the Federal Communications Commission to the Department of Justice concerning those Dial-A-Porn providers having appeared to violate Section 64.201 of the FCC regulations; and

f) All documents concerning any direct or indirect stipulations, agreements or understandings with any Dial-A-Porn providers to place enforcement proceedings in abeyance for any reason whatsoever, including but not limited to, the pendency of any judicial proceedings.

2. The Bureau identified and released a large number of documents falling within the scope of Mr. Frankfort's request. The Bureau withheld, however, a one-page intra-agency letter pursuant to the attorney work-product doctrine embodied in Exemption 5 of the FOIA, 5 U.S.C. 552(b)(5).[1] The letter, dated April 30, 1986, was exchanged between two attorneys employed by the Department of Justice, and it relates to the general question of holding Dial-A-Porn enforcement proceedings in abeyance. Specifically, the letter referenced discussions with Commission staff about pending litigation in Sable Communications of California, Inc. v. FCC, No. CV 86-2546-AWT (C.D. Cal.), and summarized the attorney-author's opinion regarding certain aspects of the litigation. In withholding the document, the Bureau reasoned that disclosure could compromise the Government's position in pending litigation, and therefore, that release of the letter was not warranted.

3. On review, Mr. Frankfort asserts that, because Sable v. FCC was dismissed, the Bureau's rationale for withholding the document now appears to be inapplicable.

4. After carefully examining the Bureau's determination, we agree that the document at issue remains protected from mandatory disclosure pursuant to the attorney work-product doctrine. In connection with Mr. Frankfort's assertion concerning the status of Sable v. FCC, we note that the District Court's dismissal of that action is now pending before the United States Court of Appeals for the 9th Circuit. Sable Communications of California, Inc. v. Federal Communications Commission, appeal docketed, No. 75-699 (9th Cir. July 24, 1986). Further, even in the absence of pending litigation, legal precedents established in this area clearly indicate that termination of litigation does not vitiate the protection otherwise accorded to attorney work-product material. See *FTC v. Grolier, Inc.*, 462 U.S. 19, 28 (1983).

5. We also are mindful of our obligation to disclose reasonably segregable factual information contained in protected documents. Recent Supreme Court decisions, however, afford sweeping protection to factual information contained in documents generated under the attorney work-product doctrine. See *United States v. Weber Aircraft Corp.*, 104 S. Ct. 1488 (1984); FTC v. Grolier, Inc., 462 U.S. 19 (1983). Therefore, we find no compelling legal reason to segregate any factual information contained in the withheld document.

6. Finally, while the Commission may exercise discretionary authority to release protected documents, 47 C.F.R. 0.461(f)(4), we find that the requestor has failed to make any showing that the public interest benefits of disclosure would outweigh its potential harmful effects.

7. Accordingly, IT IS ORDERED, that the Application for Review filed by Robert D. Frankfort, Esq. IS DENIED. Judicial review of this action may be sought pursuant to 5 U.S.C. 552(a)(4)(B). The officials responsible for this action are the following Commissioners: Chairman, Mark S. Fowler, Commissioner, James H. Quello, Commissioner, Mimi Weyforth Dawson, Commissioner, Dennis R. Patrick, Commissioner Patricia Diaz Dennis.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

FOOTNOTES

[1] Exemption 5 of the FOIA protects from compulsory disclosure "inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. 552(b)(5). This exemption was intended to incorporate certain common law privileges developed in civil discovery cases, such as the attorney work-product doctrine. This doctrine assures an attorney a "'zone of privacy' within which to think, plan, weigh facts and evidence, candidly evaluate a client's case, and prepare legal theories." See *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 864 (D.C. Cir. 1980).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: November 3, 1986

FEDERAL-STATE JOINT BOARD INCLUDES DATA SUMMARY IN CC DOCKET NO. 80-286 FILE

The Federal-State Joint Board's Order Inviting Comments and Request for Data, *Amendmentof Part 67 of the Commission's Rules and Establishment of a Joint Board*, CC Docket No. 80-286, FCC 86J-1, released May 7, 1986, requested data on the separations treatment of Category 6, Local Dial Switching Equipment, Category 8, Circuit Equipment, and other Central Office Equipment. The United States Telephone Association has summarized the data filed on Category 8 and that summary has been made part of the official CC Docket No. 80-286 file.

Persons wishing to review or copy this data summary may do so during normal business hours in the Commission's Docket Reference Room, 1919 M Street, N.W., Room 239, Washington, D.C. 20554. Copies may also be obtained from the Commission's copy contractor, International Transcription Service, 2100 M Street, N.W., Room 140, Washington, D.C. 20037 (202) 857-3800.

For further information regarding this data summary, contact Michael Wilson at (202) 632-7500.

FCC

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: November 3, 1986

FEDERAL STATE JOINT BOARD INCLUDES DATA REQUEST IN CC DOCKET NOS. 78-72 AND 80-286

The Federal-State Joint Board's Order Inviting Comments and Request for Data, *MTS and WATS Market Structure*, CC Docket No. 78-72 and *Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board*, CC Docket No. 80-286, FCC 86J-3, released July 25, 1986, requested data on the separations treatment of Account 662, Revenue Accounting Expenses. The Joint Board found that much of the data was inconsistent or incomplete and subsequently requested additional data. That additional data has been made part of the official CC Docket Nos. 78-72 and 80-286 files.

Persons wishing to review or copy this data may do so during normal business hours in the Commission's Docket Reference Room, 1919 M Street, N.W., Room 239, Washington, D.C. 20554. Copies may also be obtained from the Commission's copy contractor, International Transcription Service, 2100 M Street, N.W., Room 140, Washington, D.C. 20037 (202) 857-3800.

For further information regarding this data, contact Michael Wilson at (202) 632-7500.

FCC

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Applications of

MCCAW SPACE TECHNOLOGIES, INC. File No. 2520-DSS-ML-86

Request for Reassignment of Orbital Locations

Order

Adopted: October 24, 1986 Released: November 4, 1986

By the Chief, Domestic Facilities Division:

1. McCaw Space Technologies, Inc. (McCaw) has filed a request for a change in the orbital locations assigned to its three radiodetermination satellite service (RDSS) space stations. In *McCaw Space Technologies , Inc .*, Mimeo No. 6143 (released August 7, 1986) (*McCaw Authorization Order*), McCaw was authorized to construct four and launch three RDSS satellites into the 70', 100' and 130' West Longitude (W.L.) locations. The same locations were assigned to another applicant, Geostar Corporation (Geostar). *Geostar Corporation*, Mimeo No. 6144 (released August 7, 1986).[1] McCaw, in a joint filing with Geostar, requests that McCaw's satellites be reassigned to the 74', 104' and 134' W.L. orbital positions. No oppositions to McCaw's request have been filed.

2. McCaw's request will be granted because it has been agreed to by all affected licensees and will not create any interference problems.[2]

3. Accordingly, pursuant to Section 0.291 of the Commission's rules on delegations of authority, IT IS ORDERED that Application File No. 2520-DSE-ML-86 IS GRANTED and McCaw Space Technologies, Inc. IS AUTHORIZED to locate its three in-orbit radiodetermination satellites at 74', 104' and 134' W.L.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] All applicants were granted their requested locations because coding techniques were expected to resolve any potential interference problems. *See* McCaw Authorization Order at note 12.

[2] McCaw also requested an extension of time, until November 6, 1986, in which to submit its international coordination information. *See* McCaw Authorization Order at paragraph 8. McCaw's request is granted although it is urged to submit this information as soon as possible. In no event should the required information be submitted later than November 6, 1986.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: November 3, 1986

AMERICAN TELEPHONE AND TELEGRAPH COMPANY SEEKS WAIVER OF THE COMMISSION'S RULES TO INCREASE THE COST OF EXPENSING INDIVIDUAL ITEMS OF EQUIPMENT

PLEADING CYCLE ESTABLISHED

On October 20, 1986, the American Telephone and Telegraph Company (AT&T) filed a petition for a partial waiver of Sections 31.2-20(d), 31.221, and 31.262 of the Commission's accounting rules so that AT&T can expense the cost of individual items of equipment costing $500 or less and amortize the previously capitalized, undepreciated investment in such items over a three year period commencing January 1, 1986.

Persons wishing to comment on this petition should do so by November 24, 1986. Reply comments may be filed by December 12, 1986. Parties are requested to serve copies of the comments upon International Transcription Services at their offices in Room 246, 1919 M Street, N. W., Washington, D. C. 20554, and upon Gerald Brock, Acting Chief, Accounting and Audits Division.

Copies of the petition may be obtained from International Transcription Services, Inc., 2100 M Street, N. W., Washington, D. C. 20036, (202) 857-3800. The document is also available for public inspection and copying in Room 812, 2000 L Street, N. W., Washington, D. C. 20554.

For further information contact John T. Curry or Hugh Boyle at (202) 634-1861.

FCC

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: November 4, 1986

FEDERAL-STATE JOINT BOARD INCLUDES DATA SUMMARY

IN CC DOCKET NO. 86-297 FILE

On July 25, 1986, the Federal-State Joint Board in CC Docket No. 86-297 issued an Order Inviting Comments and Request for Data, *Amendment of Part 67 of the Commission's Rules and Establishment of a Federal-State Joint Board*, CC Docket No. 86-297, FCC 86J-4, released July 25, 1986. The Chief, Common Carrier Bureau revised the filing date for data regarding the Class A Separations Manual to October 17, 1986. *Amendment of Part 67 of the Commission's Rules Establishment of a Joint Federal-State Board*, CC Docket No. 86-297, Mimeo No. 6803, released September 8, 1986; Erratum, Mimeo No. 6952, released September 17, 1986. This data has been summarized by Bell Communications Research (Bellcore) and this summary has been made part of the official CC Docket No. 86-297 file.

Persons wishing to review or copy this data summary may do so during normal business hours in the Commission's Docket Reference Room, 1919 M Street, N.W., Room 239, Washington, D.C. 20554. Copies may also be obtained from the Commission's copy contractor, International Transcription Service, 2100 M Street, N.W., Room 140, Washington, D.C. 20037 (202) 857-3800.

For further information regarding this data summary, contact Michael Wilson at (202) 632-7500.

Federal Communications Commission

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

DETROIT SMSA LIMITED PARTNERSHIP,

Complainant,

v.

GRAND RAPIDS CELLULAR TELEPHONE COMPANY, LANSING CELLULAR TELEPHONE COMPANY and DETROIT CELLULAR TELEPHONE COMPANY,

File Nos. E-86-96, E-86-97, E-86-98

Defendants.

ORDER

Adopted October 29, 1986 ; Released November 5, 1986

By the Common Carrier Bureau:

1. On June 18, 1986, Detroit SMSA Limited Partnership (complainant) filed a complaint against Grand Rapids Cellular Telephone Company, Lansing Cellular Telephone Company and Detroit Cellular Telephone Company (defendants) alleging that defendants were refusing to provide roaming arrangements for subscribers to its cellular mobile telephone service and that such conduct contravened Commission policy and basic principles of antitrust law.

2. Following a settlement conference called by the Bureau's Enforcement Division, defendants reported by letter dated August 1, 1986, that settlement negotiations were continuing but maintained that there was no basis in Commission law or policy requiring the roaming arrangements sought by complainant. Subsequently, by letter filed August 18, 1986, the parties reported a proposed settlement of the matters contained in the complaint. Both parties desired to determine whether the parties complied with the terms of the roaming arrangement prior to requesting dismissal of the case. By letter dated October 21, 1986, the parties advised that such settlement agreement had been reached and implemented and that the complaint should therefore be dismissed.

3. The Commission favors settlements of disputes which would otherwise require time-consuming and costly proceedings to resolve. *AT&T Communications, Inc. v. Mountain States Telephone and Telegraph Co.*, Mimeo No. 7181 (Oct. 1, 1986). Accordingly, because no matters remain in controversy, we will grant complainant's request to withdraw its complaint.

4. Accordingly, IT IS ORDERED, pursuant to authority delegated in Section 0.291 of the Commission's Rules, that the joint request of the parties requesting dismissal of the complaint in the above-captioned proceeding IS GRANTED.

5. IT IS FURTHER ORDERED that the complaint filed by Detroit SMSA Limited Partnership on June 18, 1986 (File Nos. E-86-96, E-86-97 and E-86-98) IS DISMISSED.

6. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 83-523

Amendment of Part 74 of the
Commission's Rules and Regulations
In Regard to the Instructional
Television Fixed Service

ERRATUM

Released: November 4, 1986

On October 3, 1986, the Commission released a Memorandum Opinion and Order in the captioned proceeding. Because of a delay in the publication of the summary of this action in the Federal Register, the effective date of the action is extended to November 28, 1986.

Federal Communications Commission

Before the
Federal Communications Commission
Washington, D.C. 20554

Released: November 4, 1986

PUBLIC NOTICE

CENTEL SEEKS WAIVER OF ORDER REGARDING EQUAL ACCESS AND NETWORK RECONFIGURATION PLEADING CYCLE ESTABLISHED

On December 9, 1985, the Commission released a *Memorandum Opinion and Order*, FCC 85-628, in which it prescribed the method of accounting for recovery of equal access and network reconfiguration costs. On October 20, 1986, the Centel Telephone Companies filed a Petition for Waiver of the Commission's Order.

Persons wishing to comment on this filing may do so by November 18, 1986. Reply comments should be filed by November 25, 1986. Parties are requested to serve copies of the comments upon International Transcription Services at their offices in Room 246, 1919 M Street, N.W., Washington, D.C. 20554, and upon Gerald Brock, Chief, Accounting and Audits Division.

Copies of the petition and related documents may be obtained from International Transcription Service, Inc., 2100 M Street, N.W., Washington, D.C. 20036, (202)857-3800. The documents are also available for public inspection and copying in Room 812, 2000 L Street, N.W., Washington, D.C. 20554.

For further information contact Thaddeus Machcinski at (202) 634-1861.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

ANN D. GENTHNER

For a Construction Permit for a
new FM Station on Channel 232A
Christiansted, St. Croix,
Virgin Islands

MEMORANDUM OPINION AND ORDER

Adopted: October 24, 1986 Released: November 6, 1986

By the Commission:

1. The Commission has under consideration an Application for Review filed January 21, 1986, by Ann D. Genthner ("Genthner") of an action by the Mass Media Bureau staff, denying Genthner's Petition for Reconsideration and returning the above-captioned application.

2. Genthner submitted her application on July 12, 1985 (the last day of the filing "window"). The application was returned by the staff on August 26, 1985, because it was found not sufficient for tender in that the applicant failed to include a certification of site availability as required by paragraph 2(d) Appendix D of the *Report andOrder* in Docket 84-750, 50 Fed. Reg. 19936 (1985).[1]

3. Genthner petitioned for reconsideration on September 17, 198 5, submitting an amended application and stating that: (1) the certification of site availability was a relatively new requirement; (2) the FCC's San Juan Field Office did not receive FCC forms for certification of site availability until June 25, 1985; and (3) since she had requested the application forms prior to the filing window opening for this channel (June 13 - July 12, 1985), the San Juan office had sent her an application without including the site availability certification form. Genthner's petition for reconsideration was denied by the staff on December 5, 1985, and the amended application was returned on the ground that Genthner had had ample opportunity after June 25, 1985 to acquire, complete and submit the certification form, or submit an alternative certification as provided in the *Report and Order*, with the application filed July 12, 1985.

4. In her application for review, Genthner claims that she was unaware of the site-availability certification requirement until her application was returned on August 26, 1986 and that it is evident that the FCC Field Office in Puerto Rico erred in not furnishing her the proper forms to enable her to complete her application.

5. As was made clear in the staff's letter to Genthner denying reconsideration, the Commission in Docket 84-750 promulgated new FM processing procedures which, among other things, restrict the period of time within which amendments going to the tenderability of applications may be filed. *See* | 31 and Appendix D of the *Report and Order*, as well as 47 C.F.R. §§ 73.3522(a)(6) and 73.3564(a). Under the new processing procedures, applicants may perfect the tenderability of their applications and retain "window" status *only* by an amendment filed by the close of the applicable window. Therefore, to properly lie, a petition for reconsideration of a finding of untenderability and a request for *nunc pro tunc* reinstatement of the application in question must demonstrate that such finding concerning the application *as on file at the close of the window* was erroneous. *See Report and Order, Id.*, and 47 C.F.R. § I.106(d)(2). The instant pleading does not demonstrate that the finding of untenderability of the Genthner application as originally tendered was erroneous.

6. We reject Genthner's claim that the Commission failed to provide sufficient notice of its site certification requirement. As noted by the staff in denying Genthner's petition for reconsideration, the need for the site-availability certification is specifically discussed in paragraph 22 of the *Report and Order* and paragraph 2(d) of Appendix D, both published in the Federal Register, on May 13, 1985. Thus, applicants were charged with constructive notice of the content of that document. It is well settled that under 44 U.S.C. § 1507 publication in the Federal Register constitutes constructive notice of Commission processing requirements regardless of whether a particular applicant has no actual notice. *SeeM & C Broadcasting, Inc.*, FCC 85-217, Mimeo 35777 (released April 29, 1985), citing Federal Crop Insurance v. Merrill, 332 U.S. 380 (1947). *See also Diamond Ring Ranch, Inc., v. Morton*, 531 F.2d 1397 (10th Cir. 1976). Any applicant for a commercial FM construction permit, "should have read [that Federal Register publication] carefully and been alerted to" the site availability certification information requirement. *Salzer v. FCC*, 778 F.2d 869, 876 (D.C. Cir. 1985). As conceded by Genthner, the Commission's San Juan Field Office had site certification forms available after June 25, 1985. Therefore, while Genthner did not initially receive a site certification form with her FCC Form 301 application, she had ample opportunity after June 25, 1985 to acquire, complete and submit such a form with the Form 301 application, which she did not file until July 12, 1985. Alternatively, Genthner could have included her own certification, pursuant to the Commission's direction as provided in | 22 and Appendix B of the *Report and Order*.

7. Accordingly, for the foregoing reasons, IT IS ORDERED, That the Application for Review filed by Ann D. Genthner IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William Tricarico
Secretary

FOOTNOTES

[1] By means of the *Report and Order* in Docket 84-750, 50 Fed. Reg. 19936 (1985) (**"***Report and Order***"**), the Commission established as a prerequisite of tenderability or substantial completeness that broadcast applicants include, as part of their applications, certifications as to certain matters. Paragraph 2(d) of Appendix D to the *Report and Order*, states:

> Site availability. The Commission does not require of applicants absolute certainty of site availability, but rather reasonable assurance. An application specifying an unavailable site *per se* frustrates the Commission's stated goal of expeditious introduction of service. Such a find-

ing requires an amendment specifying a site change before grant or a further application for construction-permit modification after grant. To avoid vacuous and sequential filings, the Commission has imposed a requirement of site-availability certification which includes the name and address of the site owner or his agent. Failure of an applicant to provide the requisite certification in the form set forth in Appendix B of the *Report and Order* in Docket 84-750, *supra*, will result in the application being deemed not substantially complete.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

MATTHEW D. WIGGINS, JR.

For a Construction Permit for a
new FM Station on Channel 288A
Apalachicola, Florida

MEMORANDUM OPINION AND ORDER

Adopted: October 24,1986 **Released:November 6, 1986**

By the Commission:

1. The Commission has under consideration an Application for Review filed January 21, 1986, by Matthew D. Wiggins ("Wiggins") of an action by the Mass Media Bureau staff, denying Wiggins' Petition for Reconsideration and returning the above-captioned application.

2. Wiggins submitted his application on July 9, 1985. The application was returned by the staff on August 20, 1985, because it was found not sufficient for tender in that the radiation-center height listed in Section V-B, Item 6 of FCC Form 301 conflicted with the data on the antenna sketch submitted as an exhibit required by Section V-G, Item 6.[1] The Wiggins application was also deemed not sufficient for tender because the transmitter site map submitted with the application failed to comply with the requirements established for such maps in a *Public Notice* released April 5, 1985. Issues relating to the transmitter site map requirements have been addressed in a separate *Memorandum Opinion and Order* released this day and, therefore, are not discussed herein.

3. Wiggins petitioned for reconsideration on September 16, 1985, stating that: (1) the application complied with all requirements of the Commission's rules and applicable forms; (2) the action by the Commission was arbitrary and capricious as all the questions in the application form were fully answered and Wiggins saw no discrepancies as to Item 6, Section V-B and Item 6, Section V-G. and (3) even if there were a discrepancy, the Commission, under *James River Broadcasting Co. v. FCC*, 39 F.2d 581 (D.C. Cir. 1968) ("*James River*"), is required to accept amendments where there is some "minor inconsistency" between the application and Commission requirements. Wiggins' petition for reconsideration was denied by the staff on November 14, 1985, on the grounds that: (1) applicants were given ample notice in the *Report and Order* in Docket 84-750 that such omissions or unresolvable inconsistencies would be dealt with by dismissal of the subject applications; (2) the *Report and Order*, which specified the tenderability requirements regarding the consistency and accuracy of such data, was adopted after a notice and comment period; and (3) *James River* does not apply because the processing rules which were the basis for the *James River* holding have been dramatically changed. In his application for review, Wiggins merely reiterates all of the arguments advanced in his petition for reconsideration, again indicating that he and his counsel are unable to ascertain the exact discrepancy between the tower sketch in Section V-G, Item 6, and the height specifications in Section V-B, Item 6.

4. At the outset, despite Wiggins' professed inability to discover the patent inconsistency in critical data, the discrepancy is obvious. Exhibit E, Figure 1, (tower sketch) shows the overall structure height as 341 feet above mean sea level. The tower sketch also indicates that the radiation center is 13 feet below the overall height of the tower structure. This would result in an antenna radiation center height above mean sea level of 328 feet. (This figure coincides with Section V-B, Item 6). However, the same tower sketch specifies the radiation center as 331 feet above mean sea level. Because of the internal inconsistencies, we cannot determine the actual antenna radiation center above mean sea level, an element which must be specified on the station authorization.

5. The Commission specifically addressed the effect of inconsistent information in Appendix D to the *Report and Order*: [If] any of the above information is missing, the application will be returned as not sufficient for tender. If any of the above information is present but, on the face of the application, visibly incorrect or inconsistent, the application will be treated in accordance with the following guidelines. If the needed information can be derived or the discrepancy resolved, confidently and reliably, drawing on the application as a whole, such defect will not render the application not sufficient for tender. However, if the critical data cannot be derived or the inconsistency resolved within the confines of the application and with a high degree of confidence, the presence of the clearly void data will be treated as functionally equivalent to the absence of such data. In such instances, the defective application will be deemed not sufficient for tender.

50 Fed. Reg. at 19946. Wiggins' application contained incorrect information and the Commission staff, "drawing on the application as a whole," was not able to derive the needed information or to resolve, "confidently and reliably", the resulting inconsistency "with a high degree of confidence." As a result, the incorrect information in question made further processing of the application impossible.

6. Contrary to Wiggins arguments, the Commission has not acted unreasonably in adopting an FM application processing standard which requires a "hard look" approach as to certain critical elements that are essential to a determination that the application is "substantially complete." In Appendix D to the *Report and Order*, the Commission stated that, henceforth, it would follow a new "substantially complete" standard for determining whether or not an application should be given a reference number and processed. The Commission did not initiate a so-called "letter perfect" standard for receiving applications for processing, as it did, for example, in adopting a "strict compliance" standard for low-power television applications. *See Low Power Television Service*, 51 RR 2d 476, 501, 502 (1982). It chose, instead, to carefully define, in Appendix D, what constitutes a substantially complete FM application under the new "window filing" procedures. Although administrative fairness requires full notice to parties whose rights may be affected by our policies, where such notice is afforded, the Commission may require strict compliance. *SeeSalzer v. FCC*, 778 F.2d 869, 877 (D.C. Cir. 1985) (reversed on other grounds). To meet changed circumstances, we may modify our processing standards and substantial completeness requirements as they apply to FM, so long as we do so explicitly and

with good reason and provide adequate notice. *Id.* at 873; *SeealsoRadio Athens, Inc. v. FCC*, 401 F. 2d 398 (D.C. Cir. 1968). Those requisites are present here.

7. Because the processing rules which were the basis for the holding in *James River*have been dramatically changed, that case does not apply here to either the new processing rules or to "substantial completeness" thereunder. In making these changes, we articulated the following justifications for taking a "hard look" approach in instituting the tender review of applications and for redefining "substantial completeness" under this new approach: Under our previous system, many errors in key portions of the applications remained undetected until considerable processing time and effort had already been expended. Discovery of fundamental errors so far along in the processing chain resulted in significant delays both in disposing of the flawed applications and in processing problem-free but mutually exclusive applications as well as impeded the disposition of unrelated problem-free applications. Therefore, to prevent carelessly prepared, unprocessable applications from burdening the processing system, we will require applications to be substantially complete at tender or they will be returned, thereby losing their filing status. In order to assist applicants in satisfying our tender standards, we are attaching hereto as Appendix "D" a detailed list of the criteria utilized in evaluating the substantial completeness of applications. The Commission believes that important benefits can be obtained from this "hard-look" approach. First, the reduction of frivolous and speculative applications will enable us to expedite the processing of applications tendered by serious candidates who are "ready, willing and able" to rapidly bring service to the public. Secondly, streamlining our processing procedures will minimize the Commission's administrative costs, enabling us to make more efficient use of our limited staff and other resources. These benefits are critical to making the window filing and "first come/first serve" process work smoothly and with minimal delay in processing large numbers of applications. *Report and Order*, 50 Fed. Reg. at 19940.

8. Arguments questioning the reasonableness of changing the processing guidelines should have been presented during the rulemaking notice and comment period or on reconsideration following the release of the *Report and Order*. In any event, that document provides abundant justification for the processing changes, as illustrated above in paragraph eight. While it is desirable to have as many qualified applicants as possible from which to select a broadcast licensee, "[w]e have recently undertaken to place greater emphasis on providing service to the public in the most efficient, expeditious manner possible. Temporizing with flawed proposals has in the past disserved the public interest by inordinately delaying the initiation of new service." *Chudy Broadcasting Corporation*, 58 RR 2d 133, 134 n. 7 (1985).

9. Finally, Wiggins claims that the Commission failed to provide sufficient notice to the public of its strict new processing guidelines. We also reject this argument. As noted above, the need for the antenna radiation-center height information requested in Section V-B, Item 6 and the antenna sketch data requested in Section V-G, Item 6 is specifically discussed in paragraph 4(e) of Appendix D of the *Report and Order*, published in the Federal Register on May 13, 1985. Thus, applicants are charged with constructive notice of the content of that document. It is well settled that under 44 U.S.C. § 1507 publication in the Federal Register constitutes constructive notice of Commission processing requirements regardless of whether a particular applicant has no actual notice. *SeeM&C Broadcasting, Inc.*, FCC 85-217, Mimeo 35777 (released April 29, 1985), *citing Federal Crop Insurance v. Merrill*, 332 U.S. 380 (1947). *See also Diamond Ring Ranch, Inc. v. Morton*, 531 F.2d 1397 (10th Cir. 1976). Any applicant for a commercial FM construction permit, "should have read [that Federal Register publication] carefully and been alerted to" the information requirement. *Salzer v. F.C.C.*, 778 F.2d at 876.

10. Accordingly, for the foregoing reasons, IT IS ORDERED, That the Application for Review filed by Matthew D. Wiggings, Jr. IS DENIED.[2]

FEDERAL COMMUNICATIONS COMMISSION

William Tricarico
Secretary

FOOTNOTES

[1] By means of the *Report and Order* in Docket 84-750, 50 Fed. Reg. 19936 (1985) ("*Report and Order*"), the Commission established as a prerequisite of tenderability or substantial completeness that broadcast applicants include, as part of their applications, responses to Section V-B, Item 6 and Section V-G, Item 6, FCC Form 301. Paragraph 4(e) of Appendix D to the *Report and Order*, states:

> Also necessary are the antenna heights above average terrain, above ground level, and above mean sea level. These three are interrelated and must be specified consistently, as is the case with all other crucial engineering parameters. Antenna height is as elemental a facility parameter as is ERP. It also is subject to permissible-range values as a function of station class and, with ERP, determines the coverage area of a facility for a given signal strength. Antenna height is also limited in certain cases by international treaty or by allocation constraints. Antenna height and ERP are also used to determine adverse potential to radio quiet zones, adjacent and co-channel "grandfathered" stations, and to FCC monitoring facilities. Antenna height above ground affects the environmental and aerial-navigation aspects of a facility proposal. Clearly, the various antenna heights are employed in a number of processing evaluations by the staff. Their absence, or the absence of any one of them, renders the application not substantially complete.

[2] In a separate *Memorandum Opinion and Order* adopted this day, the staff has been directed to reinstate those applications returned for failure to comply with the requirements established in a *Public Notice*, Mimeo 3693, released April 5, 1985. Because Wiggins' application contained an additional defect which rendered it not sufficient for tender, our action in that separate *Memorandum Opinion and Order* shall have no impact on the decision rendered herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

JOANNE BREHM

For a Construction Permit for a
new FM Station on Channel 265A
Apalachicola, Florida

MEMORANDUM OPINION AND ORDER

Adopted: October 24, 1986 **Released: November 6, 1986**

By the Commission:

1. The Commission has under consideration an Application for Review filed January 21, 1986, by Joanne Brehm ("Brehm") of an action by the Mass Media Bureau staff, denying Brehm's Petition for Reconsideration and returning the above-captioned application.

2. Brehm submitted her application on July 9, 1985. The application was returned by the staff on August 20, 1985, because it was found not sufficient for tender in that the radiation-center height listed in Section V-B, Item 6 of FCC Form 301 conflicted with the data on the antenna sketch submitted as an exhibit required by Section V-G, Item 6.[1] The Brehm application was also deemed not sufficient for tender because the transmitter site map submitted with the application failed to comply with the requirements established for such maps in a *Public Notice* released April 5, 1985. Issues relating to the transmitter site map requirements have been addressed in a separate *Memorandum Opinion and Order* released this day and, therefore, are not discussed herein.

3. Brehm petitioned for reconsideration on September 19, 1985, stating that: (1) the application complied with all requirements of the Commission's rules and applicable forms; (2) the action by the Commission was arbitrary and capricious as all the questions in the application form were fully answered and Brehm saw no discrepancies as to Item 6, Section V-B and Item 6, Section V-G. and (3) even if there were a discrepancy, the Commission, under *James River Broadcasting Co. v. FCC*, 39 F.2d 581 (D.C. Cir. 1968) ("*James River*"), is required to accept amendments where there is some "minor inconsistency" between the application and Commission requirements. Brehm's petition for reconsideration was denied by the staff on November 14, 1985, on the grounds that: (1) applicants were given ample notice in the *Report and Order* in Docket 84-750 that such omissions or unresolvable inconsistencies would be dealt with by dismissal of the subject applications; (2) the *Report and Order*, which specified the tenderability requirements regarding the consistency and accuracy of such data, was adopted after a notice and comment period; and (3) *James River* does not apply because the processing rules which were the basis for the *James River* holding have been dramatically changed. In her application for review, Brehm merely reiterates all of the arguments advanced in her petition for reconsideration, again indicating that she and her counsel are unable to ascertain the exact discrepancy between the tower sketch in Section V-G, Item 6, and the height specifications in Section V-B, Item 6.

4. At the outset, despite Brehm's professed inability to discover the patent inconsistency in critical data, the discrepancy is obvious. Exhibit E, Figure 1, (tower sketch) shows the overall structure height as 341 feet above mean sea level. The tower sketch also indicates that the radiation center is 13 feet below the overall height of the tower structure. This would result in an antenna radiation center height above mean sea level of 328 feet. (This figure coincides with Section V-B, Item 6). However, the same tower sketch specifies the radiation center as 331 feet above mean sea level. Because of the internal inconsistencies, we cannot determine the actual antenna radiation center above mean sea level, an element which must be specified on the station authorization.

5. The Commission specifically addressed the effect of inconsistent information in Appendix D to the *Report and Order*: [If] any of the above information is missing, the application will be returned as not sufficient for tender. If any of the above information is present but, on the face of the application, visibly incorrect or inconsistent, the application will be treated in accordance with the following guidelines. If the needed information can be derived or the discrepancy resolved, confidently and reliably, drawing on the application as a whole, such defect will not render the application not sufficient for tender. However, if the critical data cannot be derived or the inconsistency resolved within the confines of the application and with a high degree of confidence, the presence of the clearly void data will be treated as functionally equivalent to the absence of such data. In such instances, the defective application will be deemed not sufficient for tender.

50 Fed. Reg. at 19946. Brehm's application contained incorrect information and the Commission staff, "drawing on the application as a whole," was not able to derive the needed information or to resolve, "confidently and reliably", the resulting inconsistency "with a high degree of confidence." As a result, the incorrect information in question made further processing of the application impossible.

6. Contrary to Brehm's arguments, the Commission has not acted unreasonably in adopting an FM application processing standard which requires a "hard look" approach as to certain critical elements that are essential to a determination that the application is "substantially complete." In Appendix D to the *Report and Order*, the Commission stated that, henceforth, it would follow a new "substantially complete" standard for determining whether or not an application should be given a reference number and processed. The Commission did not initiate a so-called "letter perfect" standard for receiving applications for processing, as it did, for example, in adopting a "strict compliance" standard for low-power television applications. *See Low Power Television Service*, 51 RR 2d 476, 501, 502 (1982). It chose, instead, to carefully define, in Appendix D, what constitutes a substantially complete FM application under the new "window filing" procedures. Although administrative fairness requires full notice to parties whose rights may be affected by our policies, where such notice is afforded, the Commission may require strict compliance. *See Salzer v. FCC*, 778 F.2d 869, 877 (D.C. Cir. 1985) (reversed on other grounds). To meet changed circumstances, we may modify our processing standards and substantial completeness requirements as they apply to FM, so long as we do so explicitly and

with good reason and provide adequate notice. *Id.* at 873; *See also Radio Athens, Inc. v. FCC*, 401 F. 2d 398 (D.C. Cir. 1968). Those requisites are present here.

7. Because the processing rules which were the basis for the holding in *James River* have been dramatically changed, that case does not apply here to either the new processing rules or to "substantial completeness" thereunder. In making these changes, we articulated the following justifications for taking a "hard look" approach in instituting the tender review of applications and for redefining "substantial completeness" under this new approach: Under our previous system, many errors in key portions of the applications remained undetected until considerable processing time and effort had already been expended. Discovery of fundamental errors so far along in the processing chain resulted in significant delays both in disposing of the flawed applications and in processing problem-free but mutually exclusive applications as well as impeded the disposition of unrelated problem-free applications. Therefore, to prevent carelessly prepared, unprocessable applications from burdening the processing system, we will require applications to be substantially complete at tender or they will be returned, thereby losing their filing status. In order to assist applicants in satisfying our tender standards, we are attaching hereto as Appendix "D" a detailed list of the criteria utilized in evaluating the substantial completeness of applications. The Commission believes that important benefits can be obtained from this "hard-look" approach. First, the reduction of frivolous and speculative applications will enable us to expedite the processing of applications tendered by serious candidates who are "ready, willing and able" to rapidly bring service to the public. Secondly, streamlining our processing procedures will minimize the Commission's administrative costs, enabling us to make more efficient use of our limited staff and other resources. These benefits are critical to making the window filing and "first come/first serve" process work smoothly and with minimal delay in processing large numbers of applications. *Report and Order*, 50 Fed. Reg. at 19940.

8. Arguments questioning the reasonableness of changing the processing guidelines should have been presented during the rulemaking notice and comment period or on reconsideration following the release of the *Report and Order*. In any event, that document provides abundant justification for the processing changes, as illustrated above in paragraph eight. While it is desirable to have as many qualified applicants as possible from which to select a broadcast licensee, "[w]e have recently undertaken to place greater emphasis on providing service to the public in the most efficient, expeditious manner possible. Temporizing with flawed proposals has in the past disserved the public interest by inordinately delaying the initiation of new service." *Chudy Broadcasting Corporation*, 58 RR 2d 133, 134 n. 7 (1985).

9. Finally, Brehm claims that the Commission failed to provide sufficient notice to the public of its strict new processing guidelines. We also reject this argument. As noted above, the need for the antenna radiation-center height information requested in Section V-B, Item 6 and the antenna sketch data requested in Section V-G, Item 6 is specifically discussed in paragraph 4(e) of Appendix D of the *Report and Order*, published in the Federal Register on May 13, 1985. Thus, applicants are charged with constructive notice of the content of that document. It is well settled that under 44 U.S.C. § 1507 publication in the Federal Register constitutes constructive notice of Commission processing requirements regardless of whether a particular applicant has no actual notice. *See M&C Broadcasting, Inc.*, FCC 85-217, Mimeo 35777 (released April 29, 1985), *citingFederalCropInsurance v. Merrill, 332 U.S. 380 (1947). See also Diamomd Ring Ranch, Inc. v. Morton*, 531 F.2d 1397 (10th Cir. 1976). Any applicant for a commercial FM construction permit, "should have read [that Federal Register publication] carefully and been alerted to" the information requirement. *Salzer v. F.C.C.*, 778 F.2d at 876.

10. Accordingly, for the foregoing reasons, IT IS ORDERED, That the Application for Review filed by Joanne Brehm IS DENIED.[2]

FEDERAL COMMUNICATIONS COMMISSION

William Tricarico
Secretary

FOOTNOTES

[1] By means of the *Report and Order* in Docket 84-750, 50 Fed. Reg. 19936 (1985) (*"Report and Order"*), the Commission established as a prerequisite of tenderability or substantial completeness that broadcast applicants include, as part of their applications, responses to Section V-B, Item 6 and Section V-G, Item 6, FCC Form 301. Paragraph 4(e) of Appendix D to the *Report and Order*, states:

> Also necessary are the antenna heights above average terrain, above ground level, and above mean sea level. These three are interrelated and must be specified consistently, as is the case with all other crucial engineering parameters. Antenna height is as elemental a facility parameter as is ERP. It also is subject to permissible-range values as a function of station class and, with ERP, determines the coverage area of a facility for a given signal strength. Antenna height is also limited in certain cases by international treaty or by allocation constraints. Antenna height and ERP are also used to determine adverse potential to radio quiet zones, adjacent and co-channel "grandfathered" stations, and to FCC monitoring facilities. Antenna height above ground affects the environmental and aerial-navigation aspects of a facility proposal. Clearly, the various antenna heights are employed in a number of processing evaluations by the staff. Their absence, or the absence of any one of them, renders the application not substantially complete.

[2] In a separate *Memorandum Opinion and Order* adopted this day, the staff has been directed to reinstate those applications returned for failure to comply with the requirements established in a *Public Notice*, Mimeo 3693, released April 5, 1985. Because Brehm's application contained an additional defect which rendered it not sufficient for tender, our action in that separate Memorandum Opinion and Order shall have no impact on the decision rendered herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

STAR SIGNAL CORPORATION

For a Construction Permit for a
new FM Station on Channel 285A
San Clemente, California

MEMORANDUM OPINION AND ORDER

Adopted: October 24, 1986 Released: November 6, 1986

By the Commission:

1. The Commission has under consideration an Application for Review filed December 30, 1985 by Star Signal Corporation ("Star") of an action by the Mass Media Bureau staff, denying Star's Petition for Reconsideration and returning the application.

2. Star submitted its application on July 12, 1985 (the last day of the filing "window"). The application was returned by the staff on August 26, 1985, because it was found not sufficient for tender in that the radiation-center heights listed in Section V-B, Item 6 of FCC Form 301 conflicted with the data on the antenna sketch submitted as an exhibit required by Section V-G, item 6.[1]

3. Star petitioned for reconsideration and submitted a corrective amendment on September 16, 1985, stating that: (1) the center of radiation values differed by only seven feet, less than a 1% variance, and therefore the inconsistency is mathematically insignificant; (2) the new FCC processing guidelines should be construed liberally as to the first group of cases in which they are being applied; (3) harsh application of the guidelines will lead to more requests for reinstatement and will be a continuing drain on agency resources. Star's petition for reconsideration was denied by the staff on November 29, 1985 on the ground that there was a demonstrable inconsistency with respect to important information in the application, and that the small percentage of error is not controlling, since a relatively small height error can have significant consequences. For example, a one meter error can result in a failure to meet the minimum facilities required of a given class of station.[2]

4. Star's amendment was also returned as untimely filed because Star failed to demonstrate that the finding of untenderability of the application as on file at the window's close (July 12, 1985) was erroneous. As was made clear in the staff's letter to Star denying reconsideration, the Commission in Docket 84-750 promulgated new FM processing procedures which, among other things, restrict the period of time within which amendments going to the tenderability of applications may be filed. *See* | 31 and Appendix D of the *Report and Order*, as well as 47 C.F.R. §§ 73.3522(a)(6) and 73.3564(a). Under the new processing procedures, applicants may perfect the tenderability of their applications and retain "window" status *only* by an amendment filed by the close of the applicable window. Therefore, to properly lie, a petition for reconsideration of a finding of untenderability and a request for *nunc pro tunc* reinstatement of the application in question must demonstrate that such finding concerning the application *as on file at the close of the window* was erroneous. *See Report and Order, Id.*, and 47 C.F.R. § 1.106(d)(2).

5. In its application for review, Star acknowledges that there was a "minor inconsistency" in the application caused by "clerical oversight," but contends it could have been resolved by the Commission staff, drawing on the application as a whole. Star further reiterates that: (1) the action of the Bureau was unreasonable, arbitrary and narrow; (2) Star substantially complied with new FM processing guidelines; and (3) the Commission failed to provide sufficient notice of its strict processing guidelines to warn the filing public of the disproportionately great risks caused by "insignificant" errors.

6. Contrary to Star's arguments, the Bureau's action was not unreasonable, but followed the new processing procedures established by the Commission in Docket 84-750. The Commission therein adopted an FM application processing standard which requires a "hard look" approach as to certain critical elements that are essential to a determination that the application is "substantially complete." In Appendix D to the *Report and Order*, the Commission stated that, henceforth, it would follow a new "substantially complete" standard for determining whether or not an application should be given a reference number and processed. The Commission did not initiate a so-called "letter perfect" standard for receiving applications for processing, as it did, for example, in adopting a "strict compliance" standard for low-power television applications. *See Low Power Television Service*, 51 RR 2d 476, 501, 502 (1982). It chose, instead, to carefully define, in Appendix D, what constitutes a substantially complete FM application under the new "window filing" procedures. Although administrative fairness requires full notice to parties whose rights may be affected by our policies, where such notice is afforded, the Commission may require strict compliance. *See Salzer v. FCC*, 778 F.2d 869, 877 (D.C. Cir. 1985) (reversed on other grounds). To meet changed circumstances, we may modify our processing standards and substantial completeness requirements as they apply to FM, so long as we do so explicitly and with good reason and provide adequate notice. *Id.* at 873; *See alsoRadio Athens, Inc. v. FCC*, 401 F. 2d 398 (D.C. Cir. 1968). Those requisites are present here.

7. In making these changes, we articulated the following justifications for taking a "hard look" approach in instituting the tender review of applications and for redefining "substantial completeness" under this new approach: Under our previous system, many errors in key portions of the applications remained undetected until considerable processing time and effort had already been expended. Discovery of fundamental errors so far along in the processing chain resulted in significant delays both in disposing of the flawed applications and in processing problem-free but mutually exclusive applications as well as impeded the disposition of unrelated problem-free applications. Therefore, to prevent carelessly prepared, unprocessable applications from burdening the processing system, we will require applications to be substantially complete at tender or they will be returned, thereby losing their filing status. In order to assist applicants in satisfying our tender standards, we are attaching hereto as Appendix "D" a detailed list of the criteria utilized in evaluating the substantial completeness of applications. The Commission believes that important benefits can be obtained from this "hard-look" approach. First, the re-

duction of frivolous and speculative applications will enable us to expedite the processing of applications tendered by serious candidates who are "ready, willing and able" to rapidly bring service to the public. Secondly, streamlining our processing procedures will minimize the Commission's administrative costs, enabling us to make more efficient use of our limited staff and other resources. These benefits are critical to making the window filing and "first come/first serve" process work smoothly and with minimal delay in processing large numbers of applications. *Report and Order*, 50 Fed. Reg. at 19940.

8. Arguments questioning the reasonableness of changing the processing guidelines should have been presented during the rulemaking notice and comment period or on reconsideration following the release of the *Report and Order*. In any event, that document provides abundant justification for the processing changes, as illustrated above in paragraph seven. While it is desirable to have as many qualified applicants as possible from which to select a broadcast licensee, "[w]e have recently undertaken to place greater emphasis on providing service to the public in the most efficient, expeditious manner possible. Temporizing with flawed proposals has in the past disserved the public interest by inordinately delaying the initiation of new service." *Chudy Broadcasting Corporation*, 58 RR 2d 133, 134 n. 7 (1985).

9. Star next argues that it was clearly not the intent of the guidelines to penalize applicants arbitrarily if the needed information can be derived from the application as a whole. This is correct. In Appendix D to the *Report and Order* we stated, in pertinent part: [If] any of the above information is missing, the application will be returned as not sufficient for tender. If any of the above information is present but, on the face of the application, visibly incorrect or inconsistent, the application will be treated in accordance with the following guidelines. If the needed information can be derived or the discrepancy resolved, confidently and reliably, drawing on the application as a whole, such defect will not render the application not sufficient for tender. However, if the critical data cannot be derived or the inconsistency resolved within the confines of the application and with a high degree of confidence, the presence of the clearly void data will be treated as functionally equivalent to the absence of such data. In such instances, the defective application will be deemed not sufficient for tender. *Id.*, at 19946. Star's application, however, contained incorrect information and the Commission staff, "drawing on the application as a whole," was not able to either derive the needed information or resolve, "confidently and reliably", the resulting inconsistency "with a high degree of confidence."[3] As a result, the incorrect information in question made further processing of the application impossible.

10. Finally, Star claims that the Commission failed to provide sufficient notice to the public of its strict new processing guidelines. We also reject this argument. As noted above, the need for antenna radiation- center height information requested in Section V-B, Item 6 and the antenna sketch data requested in Section V-G, Item 6, FCC Form 301, is specifically discussed in paragraph 4(e) of Appendix D of the *Report and Order*, published in the Federal Register on May 13, 1985. Thus, applicants are charged with constructive notice of the content of that document. It is well settled that under 44 U.S.C. § 1507 publication in the Federal Register constitutes constructive notice of Commission processing requirements regardless of whether a particular applicant has no actual notice. *See M&C Broadcasting, Inc.*, FCC 85-217, Mimeo 35777 (released April 29, 1985), *citing Federal Crop Insurance v. Merrill*, 332 U.S. 380 (1947). See also *Diamond Ring Ranch, Inc. v. Morton*, 531 F.2d 1397 (10th Cir. 1976). Any applicant for a commercial FM construction permit, "should have read [that Federal Register publication] carefully and been alerted to" the information requirement. *Salzer v. FCC*, 778 F.2d at 876.

11. Accordingly, for the foregoing reasons, IT IS ORDERED, That the Application for Review filed by Star Signal Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William Tricarico
Secretary

FOOTNOTES

[1] By means of the *Report and Order* in Docket 84-750, 50 Fed. Reg. 19936 (1985) (*"Report and Order"*), the Commission established as a prerequisite of tenderability or substantial completeness that broadcast applicants include, as part of their applications, responses to Section V-B, Item 6 and Section V-G, Item 6, FCC Form 301. Paragraph 4(e) of Appendix D to the *Report and Order*, states:

> Also necessary are the antenna heights above average terrain, above ground level, and above mean sea level. These three are interrelated and must be specified consistently, as is the case with all other crucial engineering parameters. Antenna height is as elemental a facility parameter as is ERP. It also is subject to permissible-range values as a function of station class and, with ERP, determines the coverage area of a facility for a given signal strength. Antenna height is also limited in certain cases by international treaty or by allocation constraints. Antenna height and ERP are also used to determine adverse potential to radio quiet zones, adjacent and co-channel "grandfathered" stations, and to FCC monitoring facilities. Antenna height above ground affects the environmental and aerial-navigation aspects of a facility proposal. Clearly, the various antenna heights are employed in a number of processing evaluations by the staff. Their absence, or the absence of any one of them, renders the application not substantially complete.

[2] As originally tendered, in Section V-B, Item 6, the applicant showed 974 feet as the height above mean sea level and 99 feet as the height above ground. In the antenna sketch in Section V-G, Exhibit 3, Item 6, these heights were shown as 967 feet and 92 feet, respectively--which Star contends are the correct heights for the radiation center.

[3] Generally, the staff uses other values in the application to derive the missing or inconsistent data. For example, the center of radiation above ground can be derived by taking the center of radiation above mean sea level and subtracting the height of the ground at the tower base above mean sea level. But, where the height of center of radiation above mean sea level is given in more than one place and is in conflict, it is impossible to derive a single value of center of radiation above ground level. Thus, in this instance, it is not possible for the staff to achieve the requisite "high degree of confidence."

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Annual 1985 Access Tariff Filings

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

Adopted: October 29, 1986 ; Released: November 6, 1986

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. In a March 8, 1985 Order,[1] the Commission determined that increases in certain special access rates to the full tariffed level should be phased in over a transition period.[2] The Commission further determined that no local exchange carrier (LEC) should be permitted to recover any revenue "shortfall" attributable to the phase-in by increasing rates for other services above the allowable 12.75 percent rate of return unless it could demonstrate that the revenues lost due to the phase-in would reduce its overall interstate rate of return below a "zone of reasonableness."[3]

2. In their July 2, 1985 annual access tariff filings, some of the LECs subject to the phase-in proposed rates which would have recovered the amount of the shortfall by increasing other rates above a 12.75 percent rate of return. In an Order released September 17, 1985,[4] we concluded that none of the carriers seeking to recover the shortfall had demonstrated that special relief was necessary to prevent their rates of return from falling below a zone of reasonableness. Accordingly, we ordered the carriers to remove all such amounts from their rates and revenue requirements scheduled to become effective October 1, 1985. We stated that in making these revisions, carriers need not adopt any specific approach, so long as the total shortfall recovery amount added to any general rate category was removed; *i.e.*, an across-the-board reduction to special access rates would be acceptable.

3. American Telephone and Telegraph Company (AT&T) filed a petition for partial reconsideration. AT&T asserts that an across-the-board reduction would be reasonable if the carrier attempted to recover the shortfall by increasing special access rates across the board. AT&T notes that in a few instances a carrier attempted to recover its shortfall through disproportionate allocation to specific services. AT&T argues that an across-the-board reduction in those circumstances would allow the rates for these individual services to remain disproportionately high for reasons other than cost. Accordingly, AT&T asks that the Bureau modify the *September 17 Order* to require the LECs to eliminate any shortfall recovery from the same rate elements and in the same manner by which each attempted to recover it.[5] NYNEX opposed AT&T's petition, asserting that it should be denied as moot in light of the Bureau's decision allowing certain special access rates reflecting strategic pricing to become effective on October 1, 1985 subject to investigation.[6] It also disputes AT&T's calculation of the allocation of the attempted shortfall recovery.

II. DISCUSSION

4. We deny AT&T's petition. Our objective in the *September 17 Order* was to correct any attempts to recover the OCC shortfall while avoiding delay in the scheduled October 1 effective date for other aspects of the revised access tariffs. Accordingly, we allowed the carriers flexibility in making these corrections so long as the total shortfall recovery amount added to any general rate category was removed. In other words, the disallowed shortfall recovery revenues could be removed by an across-the-board rate reduction even though some LECs had proposed to recover the shortfall by disproportionately increasing the rates for individual special access services. We conclude that this was a reasonable approach to facilitate the timely correction of the affected tariffs. The revisions were filed in advance of the October 1 scheduled effective date and we found no patent violation of the *September 17 Order* or other Commission requirements requiring rejection or suspension.[7] Under these circumstances, we see no merit in AT&T's petition.

III. ORDERING CLAUSE

5. Accordingly, IT IS ORDERED that the Petition for Reconsideration of the Common Carrier Bureau's *September 17 Order*, Mimeo No. 7109, filed by the American Telephone and Telegraph Company, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Albert Halprin
Chief, Common Carrier Bureau

FOOTNOTES

[1] Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Phase I and Phase II, Part 1, FCC 85-100, released Mar. 8, 1985 (*March 8 Order*).

[2] The transition period was created to allow the Other Common Carriers (OCCs) time to adjust to substantially higher rates than had been previously charged for channels obtained under the Docket No. 20099 Settlement Agreement tariffs.

[3] *March 8 Order* at para. 44.

[4] Annual 1985 Access Tariff Filings, Mimeo 7109, released Sept. 17, 1985 (*September 17 Order*).

[5] By letter dated September 19, 1985, Western Union also objected to the use of across-the-board reductions.

[6] Annual 1985 Access Tariff Filings, Mimeo 7401, released Sept. 30, 1985 (*September 30 Order*); Order on Review, FCC 86-379, released Sept. 2, 1986.

[7] To the extent that these rates reflect factors other than cost, we note that the special access rate levels at issue here were incorporated into the Commission's ongoing special access investigation in CC Docket No. 85-166 and are subject to accounting orders. *September 30 Order* at paras. 126 and 138.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

T-COM, INC. File No. 30043-CD-P/L-2-84

For authority to modify the authorization of Station KNKB734 operating on frequency 158.10 MHz in the Public Land Mobile Service at Birmingham, Alabama

AMERICAN MOBILPHONE, INC (FORMERLY AMERICAN MOBILEPHONE OF ALABAMA, INC.) File No. 22529-CD-P/L-1-85

For authority to construct a new facility for Station KNKD 274 to operate on frequency 158.10 MHz in the Public Land Mobile Service at Homewood, Alabama

PAGING NETWORK OF ALABAMA, INC. File No. 23252-CD-P/L-05-85

For authority to construct additional facilities for Station KSU 947 operating on frequency 158.10 MHz in the Public Land Mobile Service at Birmingham, Dora, Bucksville, and New Hope, Alabama

ORDER ON RECONSIDERATION

Adopted: October 29, 1986; Released: November 6, 1986

By the Chief, Common Carrier Bureau:

1. American Mobilphone, Inc. (formerly American Mobilphone of Alabama, Inc.) (American) and Paging Network of Alabama (PNA) have filed petitions for reconsideration of the grant, without hearing, of the captioned application of T-Com, Inc. (T-Com). Responsive pleadings have also been filed. Also pending are the captioned applications of American and PNA, a petition to dismiss or deny PNA's application filed by American, and responsive pleadings. Finally, PNA has filed two motions for consideration of "relevant" materials by way of official notice in connection with reconsideration of the grant of T-Com's application.[1]

Background

2. T-Com was granted an eight month construction permit, File No. 24692-CD-P-2-83, to construct two facilities for Station KNKB734 to operate on frequency 158.10 MHz at two locations in Birmingham, Alabama. The construction permit was granted on January 12, 1984 and bore an expiration date of September 12, 1984. On September 7, 1984, five days before expiration of its construction permit, T-Com filed an application proposing major modifications to its authorized Birmingham facilities. T-Com's modification application was assigned File No. 30043-CD-P/L-2-84 and was accepted for filing by Public Notice, Report No. 243, released September 26, 1984.

3. On November 15, 1984, American filed an application for authority to construct a new facility for Station KNKD274 to operate on frequency 158.10 MHz at Homewood, Alabama. American's application was assigned File No. 22529-CD-P/L-1-85 and was accepted for filing by Public Notice, Report No. PMS-85-11, released April 3, 1985.[2]

4. T-Com's modification application was granted, without hearing, and appeared on Public Notice, Report No. PMS-85-13-A, released April 17, 1985. On May 17 and May 20, respectively, American and PNA filed petitions for reconsideration of the T-Com grant. American argues that its Homewood application: (1) was mutually exclusive with T-Com's modification application; (2) was filed within 60 days of the public notice of T-Com's application; (3) and was entitled to comparative hearing or lottery with T-Com's application. American argues that the granting of T-Com's application, without hearing, violated the *Ashbacker*doctrine,[3] Section 309 of the Communications Act of 1934, and Section 22.33 of the Commission's Rules. PNA argues that its Tuscaloosa application[4] was mutually exclusive with T-Com's application "and/or" American's Homewood application. PNA argues that T-Com's application failed to establish a sufficient basis for the grant of an extension of T-Com's underlying construction permit, and that, faced with the imminent expiration of its authorization "T-Com opted to file an application for 'modification' as a device to maintain its control over the 158.10 MHz frequency." PNA also argues that T-Com misrepresented the availability of its proposed sites when it stated in its original construction permit application that "[a]pplicant has obtained permission from the owner of the site proposed herein through the owner's agent, Motorola."[5] PNA submitted two affidavits purporting to demonstrate that Motorola has never been the agent for the owners of the involved sites and that the rental agents for the owners are not aware of any contacts by T-Com respecting its use of the involved sites. Both American and PNA request that the grant of T-Com's modification application be rescinded.

5. In its Opposition, T-Com challenges the standing of both American and PNA. T-Com argues that its modification application "served to extend the initial authorization," and that "any mutually exclusive filing for 158.10 MHz in the Birmingham, Alabama, area would have had to have been tendered within the sixty day cut-off period ending August 3, 1983, following public notice of T-Com's application bearing File No. 24692-CD-P-2-83." T-Com argues that its modification application was "not subject to mutually exclusive filings", so the Commission's grant did not violate the *Ashbacker*doctrine or the Commission's rules. T-Com notes that even if its modification application was subject to mutually exclusive filings, PNA's Tuscaloosa application would be cut-off as it was not filed within the 60 day period following public notice of T-Com's modification application. Respecting the site availability issue raised by PNA, T-Com challenges the PNA affidavits as hearsay and submitted a May 4, 1983 letter from the owner of both proposed sites to the attention of John Deluca at T. Communications, Inc. confirming the availability of space for lease on both involved towers. T-Com asserts that Mr. Deluca was then the Motorola agent working with T-Com, and that T-Com's application should have stated that site access was

obtained through "T-Com's agent, Motorola" rather than "owner's agent, Motorola." Moreover, T-Com notes that its modification application did not contain this discrepancy,[6] and that the May 4, 1983 letter clearly provides reasonable assurance of site availability.

6. In its reply, American argues that since the Commission's rule revisions in *Public Mobile Radio Services*, Docket No. 80-57, 95 FCC 2d 769 (1983) became effective in February of 1984, a request for major modification has *not* served to automatically extend a bare construction permit. Rather, a construction permit can only be extended by an application for extension showing that ".the failure to complete [construction] is due to causes beyond [the applicant's] control." Section 22.43(b)(1) of the Commission's Rules, as amended. Any application, such as T-Com's, which proposes major modifications, is deemed an initial application, and the prior construction permit automatically expires. *Docket No. 80-57, supra*, 54 RR 2d at 1667. Since T-Com neither submitted a Form 489 extension request nor satisfied the extension standards of Section 22.43(b)(1) of the Commission's Rules in its Form 401 modification filings,[7] American argues that T-Com's construction permit expired and T-Com's modification application must be treated as a newly-filed application subject to American's mutually exclusive Homewood application filing. In its reply, PNA reiterates its earlier arguments that T-Com is attempting to abuse the Commission's licensing processes.

7. Finally, on May 20, 1985, PNA filed an application for authority to construct and operate five additional facilities for Station KSU947 to operate on frequency 158.10 MHz at Birmingham (2 locations), Dora, Bucksville, and New Hope, Alabama (hereinafter "PNA Birmingham application"). This application was assigned File No. 23252-CD-P/L-5-85 and was accepted for filing by Public Notice, Report No. PMS-85-27, released July 24, 1985.

Discussion

8. After careful consideration of the facts and arguments presented, we conclude that the granting of T-Com's modification application was proper, and we will deny the petitions for reconsideration filed by American and PNA. Our conclusion respecting T-Com's modification application requires the return of the American Homewood and PNA Birmingham applications as unacceptable for filing.

9. We reject the argument of American that, under the Commission's revised rules, T-Com's modification application did not extend its underlying authorization. Under the Commission's rules prior to revision, Section 22.11(b) generally required the filing of FCC Form 701 by permittees seeking the extension of a construction permit. Section 22.11(b) also provided: However, Form 701 need not be filed if a permittee has requested in FCC Form 401 or 435 additional time to construct incidental to a modification of construction permit.

To accommodate the extension requests contemplated by Section 22.11(b), FCC Form 401 contained an Item number 43 relating to the extension of construction permits proposed to be modified. Item 43(a) requested "the time required to complete construction after authority is granted." Item 43(b) required statements as to: (1) the extent of construction; and (2) justification for the permittee "not having completed construction in accordance with outstanding construction permit." For modification applications, the statement of justification required by Item 43(b) is self evident: *i.e.*, that the proposed modification is necessary and that construction as then authorized would not be prudent pending disposition of the proposed modification. In recognition of this fact, the Commission adopted a policy that if a FCC Form 401 construction permit modification application was filed prior to the expiration date of the construction permit, and if an extension of the construction permit was requested by the response to Item 43(a), the underlying construction permit was automatically extended pending disposition of the modification application. If the modification application was granted, a new construction permit would be issued to replace the previous authorization. If the modification application was denied, the underlying construction permit would simultaneously expire.

10. In its revision of the Part 22 rules, *Public Mobile Radio Services*, *supra*, the Commission deleted Section 22.11(b), adopted a one-stage licensing procedure, revised Section 22.43 to consolidate all of the provisions respecting authorization extension requests, substituted a new FCC Form 489 for FCC Form 701, and revised FCC Form 401. In its revision of Section 22.43, the Commission did not specifically contemplate any change in the major modification automatic extension policy described above. *See Notice of Proposed Rulemaking*, 47 Fed. Reg. 43842, October 4, 1982, at paragraph 10 and Appendix *Section 22. 43 Term of construction permit* and *Public Mobile Radio Services*, *supra*, at 801-802. In addition, the Commission's revised authorization extension procedures and forms are entirely consistent with a continuation of the major modification automatic extension policy. Requests for an extension of time to complete construction or notification of the completion of construction with minor modifications are both covered by FCC Form 489. The holder of an authorization who proposes a major modification requiring prior Commission approval must file a FCC Form 401. The elimination of Section 22.11(b) resulted in the deletion of Item 43 from the new FCC Form 401. This deletion recognizes the fact that any holder of an authorization who timely files a major modification proposal on FCC Form 401 obviously seeks extension of the authorization pending disposition of the modification application. Requiring such applicants to make a *pro forma* extension request is unnecessary. Finally, the arguments presented by American are contrary to the Commission's stated objectives of reducing government regulation and eliminating unnecessary forms. *Public Mobile Radio Services*, *supra*, at 770. As noted above, the old rules contemplated the filing of a single Form 401 where major modifications to a construction permit were proposed. American's arguments regarding the revised rules would require a similarly situated holder of an authorization to file a Form 489 to request an extension of time to construct as well as a Form 401 to obtain approval of the major modifications proposed. Since the policy change espoused by American was not specifically contemplated by the Commission and runs counter to the Commission's stated objectives, we must reject American's contentions. We believe that the correct interpretation of the revised rules supports continuation of the major modification automatic extension policy. Since T-Com's application was filed pursuant to established Commission policy, we also reject PNA's arguments respecting T-Com's alleged abuse of the Commission's licensing processes.

11. T-Com's modification application proposed to relocate its authorized antenna sites resulting in its reliable service contours covering a new area. To the extent that the application proposed a new area to be served, T-Com's modification application was subject to mutually exclusive application filings, and T-Com's modification application was properly put on public notice. However, American's Homewood application was not limited to proposing service that would be mutually exclusive with the new area T-Com proposed to serve. Rather, the Homewood facility would cause interference to the Birmingham facilities authorized by T-Com's extended construction permit. Since the cut-off date respecting T-Com's authorized Birmingham facilities had long since expired, American's Homewood application was cut-off and unacceptable for filing. PNA's Birmingham application was not filed until some six months after the cut-off date for T-Com's modification application, and more than a month after the modification application was granted. Thus, PNA's application is likewise cut-off and unacceptable for filing. We will return American's Homewood and PNA's Birmingham applications pursuant to Section 22.20(b)(8) of the Commission's rules.

12. Finally, we reject PNA's argument that T-Com misrepresented the availability of its proposed sites. PNA's argument respecting the wording of the site availability statement in T-Com's construction permit application represents an untimely request for reconsideration of the grant of the construction permit. This argument is dismissed without further consideration. *See Standard Telephone Company*, Mimeo No. 5505, (Com. Car. Bur. July 3, 1985). Furthermore, we conclude that the May 4, 1983 letter submitted by T-Com demonstrated that T-Com had reasonable assurance of the availability of its proposed sites and that there was no intentional misrepresentation respecting site availability.

13. Based on the above, we conclude that the April 17, 1985 grant of T-Com's modification application without hearing was proper, and that the petitions for reconsideration filed by American and PNA have no merit and will be denied.

14. Accordingly, IT IS ORDERED, that the Petitions for Reconsideration filed by American Mobilphone, Inc. and Paging Network of Alabama, Inc. ARE DENIED.

15. IT IS FURTHER ORDERED, that the applications of American Mobilphone, Inc., File No. 22529-CD-P/L-1-85, and Paging Network of Alabama, Inc., File No. 23252-CD-P/L-05-85, ARE UNACCEPTABLE FOR FILING and will be returned.

16. This order is issued under Section 0.291 of the Commission's rules and is effective on its release date. Applications for review under Section 1.115 of the rules may be filed within 30 days of public notice of this order. *See* Section 1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

Albert Halprin
Chief, Common Carrier Bureau

FOOTNOTES

[1] PNA has failed to justify consideration of the materials attached to its motions. We do not believe that these materials have any relevance to the issues presented herein. PNA's motions are denied.

[2] American's Homewood application subsequently appeared under File Nos. 22528-CD-P/L-1-85 and 22510-CD-P/L-1-85 in Public Notices PMS-85-13 and PMS-85-16, released April 17 and May 8, 1985, respectively. These Public Notices were in error and should be disregarded. In addition, Public Notice, Report No. PMS-85-21, issued June 12, 1985, listed American's Homewood application under both File Nos. 22510 and 22529 and gave notice that American's application appears to be mutually exclusive with an application filed by PNA on December 19, 1984 for a facility for Station KUS409 operating on frequency 158.10 MHz at Tuscaloosa, AL, File No. 21179-CD-P/L-1-85, and with an application filed by New Jersey Bell Telephone Company. The New Jersey Bell application listing was eliminated by Public Notice, Report No. PMS-85-22, issued June 19, 1985. By letter filed June 27, 1985, American requested that the June 12, 1985 Public Notice be further corrected to delete the reference to File No. 22510 and to add T-Com's application in File No. 30043-CD-P/L-2-84. American's request to add T-Com's application will be denied since it is premised upon the correctness of the arguments presented by American to be decided herein. However, we agreed with American that the June 12, 1985 Public Notice should be withdrawn, so we vacated the involved mutual exclusivity notification by Public Notice, Report No. PMS-85-25, issued July 10, 1985.

[3] *Ashbacker* v. *FCC*, 326 U.S. 327 (1945).

[4] File No. 21179-CD-P/L-1-85, filed on December 19, 1984. *See* note 2, *supra*.

[5] T-Com's modification application represented that "[a]pplicant has arranged to lease the sites proposed herein."

[6] *See* footnote 5.

[7] American attached the affidavit of the Secretary of the Alabama Public Service Commission attesting that T-Com filed no application for state certification respecting its authorized Birmingham facilities from September 12, 1983 to September 12, 1984. American argues that T-Com's failure to seek state certification renders T-Com not eligible to request an extension under Section 22.43(b) of the Commission's Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM DOCKET NO. 85-361

LEININGER-GEDDES PARTNERSHIP	File No. BPCT-850607KO
CAPITOL COMMUNICATIONS CORPORATION	File No. BPCT-850725LB

For Construction Permit
for a New Television Station
Little Rock, Arkansas

Appearances

Thomas L. Root, Esquire on behalf of Leininger-Geddes Partnership; *Eugene T. Smith, Esquire* on behalf of Capitol Communications Corporation; and *Norman Goldstein, Esquire* on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH STIRMER

Issued: October 31, 1986 Released: November 7, 1986

Preliminary Statement

1. This proceeding was designated for hearing by *Hearing Designation Order* (Mimeo MM-1235, released December 6, 1985). Originally, four applications were designated for hearing, but only the mutually exclusive applications of Leininger-Geddes Partnership (LGP) and Capitol Communications Corporation (CCC) for a construction permit for a new commercial television broadcast station to be licensed to Little Rock, Arkansas on Channel 42 remain. [1] The issues specified in the *Hearing Designation Order* are as follows:

1. To determine with respect to each of the applicants, whether there is a reasonable possibility that the tower height and location proposed by each would constitute a hazard to air navigation.
2. To determine which of the proposals would, on a comparative basis, best serve the public interest.
3. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

2. A prehearing conference was held on February 5, 1986. Hearing sessions were held June 3, 1986 and June 4, 1986. The record was originally closed on June 4, 1986. It was reopened and closed again on October 23, 1986.

3. Proposed Findings of Fact and Conclusions of Law were filed by the applicants on August 1, 1986. Reply Findings were filed by both applicants on August 18, 1986.

Findings of Fact
Leininger-Geddes Partnership
Structure of the Applicant

4. LGP is an Arkansas general partnership with two general partners:

Name	Position	Ownership
Dale Leininger Mobile, Alabama	General Partner	51% of profits, losses and control
Darrell Geddes Little Rock, Arkansas	General Partner	49% of profits, losses and control

LGP Exhibit 1.

Integration of Ownership Into Management

5. *Dale Leininger*, one of two general partners of LGP, holds a 51 percent ownership interest in the partnership. He is entitled to 51 percent of the profits, losses and control of the business, and is obligated to provide 51 percent of the capital needed by the partnership. (LGP Exhibit 2). He currently resides in Mobile, Alabama (Tr. 34-35). He will relocate to Little Rock, Arkansas, where he will reside permanently, upon grant of a construction permit to LGP. (LGP Exhibit 2).

6. Mr. Leininger will serve as general manager of the proposed station, devoting at least 40 hours weekly to the position. In his capacity as general manager, Mr. Leininger will supervise all of the station's operations and all personnel involved therein. This would consist of developing programming policies with Mr. Geddes, scheduling of staff work schedules, establishing commercial policies (including rate card, supervision of contracts for programming services and sales contracts), developing proposals for purchase and maintenance of technical equipment, and establishing a budget for day-to-day operations, including but not limited to salaries and promotion. Mr. Leininger will have direct supervision over key management personnel, and through them, over all employees. (LGP Exhibit 2). Mr. Leininger has no broadcast experience. He intends to hire employees who are skilled in their fields and who will be able to give him advice that will aid him in decision-making and in carrying out his duties as general manager. (Tr. 42-43).

7. Mr. Leininger is currently self-employed as a business consultant. (Tr. 37, 43). He began his business in 1982. (Tr. 43). His business office is located in Mobile, Alabama, and he has a variety of clients, one of which is commercial television station WMPV(TV), Mobile. He devotes approximately 50 to 60 hours a week to his consulting business. (Tr. 37-38, 43-45). If LGP is granted a construction permit, Mr. Leininger will give up a substantial part of his consulting business, although he will not refuse to give advice to an old client who seeks him out. The station will be his top priority. (Tr. 45-46).

8. Mr. Leininger has a background in corporate and financial management. (LGP Exhibit 2; Tr. 42). Prior to starting his own business, Mr. Leininger was assistant vice president and a regional manager of Koppers Company, Pittsburg, Pennsylvania. As regional manager, he was responsible for overseeing the operations of seven sawmills, two lumber yards and an export yard. He was also responsible for overseeing 1,200 employees. (Tr. 41, 44).

9. *Darrell Geddes,* one of two general partners of LGP, holds a 49 percent ownership interest in the partnership. He is entitled to 49 percent of the profits, losses and control of the business, and is obligated to provide 49 percent of the capital needed by the partnership. (LGP Exhibit 3; Tr. 52). Mr. Geddes, for the past three years, has resided in Little Rock, Arkansas. He will remain a resident of Little Rock in the event that the LGP application is granted. (LGP Exhibit 3; Tr. 51, 52). Mr. Geddes is Black. (LGP Exhibit 3).

10. Mr. Geddes will serve as program director of LGP's proposed station, devoting a minimum of 40 hours per week to the position. As program director, he will implement the station's policies to ensure that the station's programming meets the needs, problems, and issues facing the service area. He will contact local groups and organizations to determine their needs and interests and develop programs to address those needs. He will supervise the production of such programming. Additionally, he will purchase programming to be aired on the station. (LGP Exhibit 3).

11. Mr. Geddes holds a bachelor of science degree from North Central Bible College, Minneapolis, Minnesota, in pastoral studies. (LGP Exhibit 3). His principal occupation, although part-time, is pastor of the Solid Rock Assembly of God church in Little Rock. He is also employed as a freight driver by Sun Belt Courier and as a carrier for The Democrat daily newspaper, both located in Little Rock. (LGP Exhibit 3; Tr. 55-56). If LGP is granted the contruction permit, Mr. Geddes will terminate his other employment in order to fulfill his commitment to the station, which he described as his priority. (Tr. 58). Mr. Geddes has performed volunteer ministry work in local and regional prisons. (Tr. 57-58).

12. Mr. Leininger and Mr. Geddes were introduced to each other through a mutual friend who is also a pastor of the Assembly of God Church, as is Mr. Geddes. (Tr. 47-48, 54). This friend was aware of both partners' interests in television and the communications field. (Tr. 49, 53). He was also aware that Mr. Leininger had filed an application for the station in Little Rock on his own and contacted Mr. Geddes and told him of the availability of the station and Mr. Leininger's application (Tr. 49, 53). Mr. Leininger then contacted Mr. Geddes by telephone and subsequently met with him in person in Little Rock. (Tr. 48, 53). Mr. Leininger and Mr. Geddes decided to form a partnership. (Tr. 48). A written partnership agreement was executed between the parties, and Mr. Leininger's application was amended to reflect the partnership ownership form. (Tr. 49, 52).

Diversification of Ownership of Mass Media

13. Neither LGP, Mr. Leininger nor Mr. Geddes has any managerial position, officership, directorship or ownership interest in any medium of mass communications. (LGP Exhibit 1; Tr. 37).

Air Hazard Issue

14. LGP's amendment filed May 21, 1986, reducing its proposed antenna height to 500 feet above ground level, has been accepted by *Order* (FCC 86M-2066) of the Presiding Judge released June 24, 1986. The Federal Aviation Administration has indicated that it will interpose no objection to a tower at the location proposed by LGP that does not exceed a height of 500 feet above ground level. (LGP Exhibit 4).

Capitol Communications Corporation

Structure of the Applicant

15. Capitol Communications Corporation (CCC) is an Arkansas corporation with the following corporate structure:

Name	Position	Ownership
Steve Stephens	V.P., Chairman of the Board, Director	20% 200 shrs.
Charles Stewart	President, Director	20% 200 shrs.
M. Douglas Wood	Secretary, Director	20% 200 shrs.
Brenda Mitchell	Treasurer, Director	20% 200 shrs.
Harry Thomason	Director	20% 200 shrs.

CCC Exhibit 1. CCC has authorized and issued 1,000 shares of stock. (Tr. 79, 180-181). According to Messrs. Wood and Stephens, each of the shareholders is obligated to pay, and has paid, $1,000 for his or her 200 shares of stock. (Tr. 79, 182). Each of the shareholders of CCC has signed subscription agreements or similar documents obligating them to pay $1,000 for their stock. (Tr. 81-82). Mr. Stewart testified that he knew of no document with any specific reference to dollar amount signed by him. (Tr. 118).

Integration of Ownership Into Management

16. *Steve Stephens,* as noted, is an officer, director and 20 percent shareholder of the company. (CCC Exhibit 2). He currently resides in Little Rock, Arkansas. (Tr. 67). Mr. Stephens proposes to serve as general manager of CCC's proposed station, devoting "in excess of 40 hours per week" to the position. (CCC Exhibit 2; Tr. 100). As general manager, Mr. Stephens will be responsible for supervising all personnel at the television station and making programming decisions based on the needs of the community. (CCC Exhibit 2).

17. Mr. Stephens attended Castle Heights Military Academy and the University of Arkansas. (CCC Exhibit 5).

18. Mr. Stephens has not been employed, either on a full-time or a part-time basis, with a radio or television station since 1965. (Tr. 96). His employment experience in radio consisted of a full-time position with radio station KNBY in Newport, Arkansas for eight months, sometime before or during 1957. (Tr. 96-97). From 1957 to 1965, Mr. Stephens was, officially, chief announcer and, unofficially, a producer for a CBS affiliate television station in Little Rock. In 1965 he became press secretary for Senator McClellen in Washington, D.C. In 1968 or 1969 Mr. Stephens returned to Arkansas and became director of public relations in corporate communications for an insurance company. He founded his own advertising and public relations firm, Stephens International Travel, Ltd., in 1969. Subsequently, he became director of corporate communications for Frank Lyon Co., a private holding company in Arkansas. He is now director of corporate communications for Stephens Incorporated. (CCC Exhibit 5; Tr. 97-99, 105). Mr. Stephens has never served as a general manager or as a station manager of a television station. (Tr. 97).

19. Mr. Stephens is currently employed as director of corporate communications of Stephens Incorporated, an investment banking firm "off Wall Street." (Tr. 111-112; CCC Exhibit 5). He does not own this business, but is merely an employee (the name is coincidental). Mr. Stephens will terminate his position with this firm upon grant of the CCC application. (Tr. 112). Mr. Stephens also continues to own and operate Stephens International, Ltd., an advertising agency which he founded in 1969. The agency provides both public relations and advertising services, and places advertising on electronic media and newspapers. (Tr. 105). However, the company currently has no accounts with respect to its public relations services, and only one account with respect to its advertising services from which Mr. Stephens derives income. (Tr. 105-106, 109). Nevertheless, at his deposition, Mr. Stephens testified that the agency is still engaged in public relations activities and that he has "a couple of accounts" with respect to the advertising activities of the agency. (Tr. 106-108).

20. Mr. Stephens is or has been involved in the following civic activities or organizations: Member of the Board of Visitors of the Army and Navy Academy; Chairman of the St. Vincent Hospital Council of Community Advisors; Founding member of the Board of Directors of the Arkansas Cancer Research Center; Founding chairman of the International Arkansas Youth for Understanding student exchange program; Founder of the annual Arkansas Citizen of the Year award; Member of the National Advisory Board of the March of Dimes Birth Defects Foundation; Founding chairman of the Greater Little Rock Motion Picture and Television Commission; Former member of the Board of Directors of the Better Business Bureau, the Arthritis Foundation, and the Board of the International Services for the Blind; Belongs to the Bahama Sound Beach Club, the Little Rock Racquet Club, the Pleasant Valley Country Club, and the Little Rock Club, and the Westside Tennis Club; Voted "Arkansas' Top Television Personality" sometime between 1957 and 1965; Awarded an honorary Doctor of Humanities degree from Southwestern College in Oklahoma City in 1970; Recipient of the Arkansas Junior Chamber of Commerce annual Service to Humanity Award in 1971; and Named "Communicator of the Year" by the International Association of Business Communications in 1985. CCC Exhibit 5. The record does not reflect whether these organizations and activities exist or occur in Little Rock solely, partly or not at all. It appears that some of the activities do not relate to civic activities in Little Rock.

21. *Charles Stewart*, is also an officer, director and 20 percent shareholder of the company. (CCC Exhibit 2). He currently resides in Little Rock, Arkansas. (Tr. 116). Mr. Stewart is Black. (CCC Exhibit 2). Mr. Stewart proposes to serve as assistant general manager of CCC's proposed station, devoting "approximately 40 hours per week" to the position. (CCC Exhibit 2; Tr. 126). As assistant general manager, Mr. Stewart will be responsible for assisting the general manager, assisting in directing the community relations activities of the station, and supervising maintenance activities and technical equipment. (CCC Exhibit 2; Tr. 126). He will report to the general manager. No other shareholder of CCC will report to him. (Tr. 126). According to Mr. Stewart, the station may employ a chief engineer who would report to the assistant general manager with respect to the technical equipment and maintenance. (Tr. 128).

22. Mr. Stewart graduated from Horace Mann High School in 1967. He then attended the University of Arkansas at Little Rock and graduated in 1974. He attended the ABA School of Basic Banking and graduated in 1972. Mr. Stewart completed his education with a degree from Louisiana State University, Banking School, in 1979. (CCC Exhibit 6).

23. Mr. Stewart has no broadcast experience and has never supervised maintenance activities and technical equipment before. (Tr. 126, 127). He is currently employed as a senior vice president, Public Affairs Division by the First Commercial Bank, Little Rock. (CCC Exhibit 6; Tr. 127). Mr. Stewart has been employed by the bank for approximately 15 years (Tr. 133). He began as an audit clerk in 1971, moved on to marketing management trainee in 1972, served in a branch manager position until 1974, and then became an urban affairs officer. He acted as assistant vice president from 1974 to 1976 and as vice president from 1977 to 1979. He began his current position in 1979. (CCC Exhibit 6). Mr. Stewart's current responsibilities at the bank involve mostly business development and some public relations. (Tr. 127). He intends to terminate his position at the bank if CCC's application is granted. (Tr. 134). However, Mr. Stewart also acknowledged that he has "other options" available to him besides working at the bank or at the proposed station that he is considering, including engaging in a political career sometime in the future. (Tr. 135-137).

24. Mr. Stewart has been involved in the following civic organizations and activities: Chairman of the board of the Arkansas Chapter for the Arthritis Foundation from 1984 to 1986. The chapter is based in Little Rock; Former vice president of Volunteers in Public Schools; Former vice president of Neighborhood Housing Service of Little Rock; Former chairman of the board of the Pulaski County Council on Aging, which is based in Little Rock; Former board member of the Pulaski County United Way, based in Little Rock; Vice president of the Coalition of Urban Bankers; President of the Greater Little Rock Bankers Association; Past president of the UALR Alumni Board; Member of the board of trustees for Philander Smith College; Member of the Greater Little Rock Chamber of Commerce and Legislative Affairs Committee; vice president for Community Development/Education in 1984; Member of the Arkansas State Police Commission from 1976 to 1983; appointed chairman in 1982. This is a statewide organization based in Little Rock. Lecturer for the Arkansas State Council of Economics, a statewide organization based in Little Rock. He was not a member of the council board; he spoke two or three times a year. (Tr. 133); Member of the St. Andrew A.M.E. Church in Little Rock; president of the Stewards Board; chairman of the commission on Stewardship and Finance; superintendent of Sunday school; Member of the Arkansas Industrial Development Commission from 1983 to the present. This is a statewide organization with its main office in Little Rock. (Tr. 132); Member of the Vocational Education Foundation Board, a statewide organization; member of the Vocational Advisory Committee, Little Rock School District from 1983 to the present; Member of the board of directors of the National Conference of Christians & Jews in 1984. The Arkansas chapter headquarters is located in Little Rock. Member of the Amendment 59 Special Study Commission in 1986. This was a statewide effort based in Little Rock. (Tr. 132). Vice chairman of the Economic Development Committee, Arkansas Bankers Assoc. in 1986. This Committee is active statewide but

is based in Little Rock. Member of the Business Advisory Committee, Capital City Junior College which is based in Little Rock. (CCC Exhibit 6; Tr. 131-133). Mr. Stewart is not presently involved in all the listed activities. (Tr. 131).

25. *Brenda Mitchell*, is an officer, director and 20 percent shareholder of the company. (CCC Exhibit 2; Tr. 145, 149). She currently resides in Little Rock, Arkansas. (Tr. 145). Ms. Mitchell is a white female. (CCC Exhibit 2). Ms. Mitchell proposes to serve as assistant station manager and national sales manager of CCC's proposed station, devoting "in excess of 40 hours per week" to the position. (CCC Exhibit 2; Tr. 156-157, 165-166). Ms. Mitchell assumes the station will have a station manager, and that Mr. Stephens will initially serve in that capacity, as well as general manager. (Tr. 156-157). As assistant station manager, Ms. Mitchell will be responsible for helping to implement a wide range of community relations activities for the station and will "make programming decisions." However, Ms. Mitchell has no idea how she will participate in making programming decisions or what involvement she will have with the activities of the program director. She has never discussed the matter with any of the other shareholders of CCC. (Tr. 169-172). To date, no decision has been made as to who would fill the position of program director. (Tr. 171-172). According to Ms. Mitchell, an agreement was reached among the shareholders at the February 1986 meeting that she would participate in making programming decisions. However, she did not mention this duty during her deposition when asked to describe her position and responsibilities at the proposed station. (Tr. 169-170). She explained this omission by stating she was not specifically asked about programming responsibilities. (Tr. 170-171).

26. As national sales manager, Ms. Mitchell will report to the general manager. (Tr. 160). Under her direction a national sales program will be initiated. (CCC Exhibit 2). Her responsibilities at the station will be concentrated on national sales and her role as national sales manager. (Tr. 157). Her duties as national sales manager will primarily involve selling advertising to national advertisers. (Tr. 163). According to Ms. Mitchell, there has never been a discussion as to whether there will be a general sales manager at the proposed station or who would fill such a position. (Tr. 158, 160). At her deposition, Ms. Mitchell mistakenly said that Mr. Wood would fill the position of general manager. However, she assumes she will initially act as general sales manager and be in charge of the entire sales department. (Tr. 158-159). Ms. Mitchell does not know how many employees she will have under her in her roles as assistant station manager and national sales manager. (Tr. 162).

27. Ms. Mitchell is currently employed as staff manager-Human Resources Assessment for Southwestern Bell Telephone Company, Little Rock. (CCC Exhibit 8; Tr. 146). She has been employed with Southwestern Bell for 12 years. Prior to becoming staff manager for Southwestern Bell, Ms. Mitchell was involved in yellow page sales. (Tr. 148). She indicated that she will terminate her position with Southwestern Bell upon grant of the CCC application. (Tr. 164).

28. Ms. Mitchell is involved in the following civic organizations and activities: Co-founder and president of Law Enforcement Assistance Foundation, Inc. from 1982 to the present. This organization assists law enforcement programs statewide. Member of the Community Service Council, Inc. from 1981 to the present. The organization conducts an annual statewide public service advertising campaign. Member of the board of directors of the Arkansas Advertising Federation/Little Rock from 1977 to 1982. Became involved through her position in yellow page sales for Southwestern Bell. This is a professional organization. (Tr. 148). Member of the board of directors of the University of Arkansas at Little Rock Alumni Association; Founding member of the Arkansas Childrens' Hospital Committee for the Future in 1986; Chairman of the board for Arkansas ABLE from 1982-1984; Member of the board of directors of Life Options Program from 1982-1984; Member of the United Way of Pulaski County from 1983-1984; Registered Lobbyist before the Seventy-third and Seventy-fourth General Assembly, Arkansas State Legislature. Her lobbying before the Joint Budget Committee, the House Judiciary Committee, and the Joint Interim Committee on Revenue and Taxation in 1983 was done on behalf of the Arkansas Advertising Federation. (Tr. 147-148); Commissioner for the Little Rock Motion Picture and Television Commission from 1984 to the present; Arbitrator for the Better Business Bureau/Arkansas from 1984 to the present; Judge from 1979-1982 and Advisor from 1984-1985 for the Future Business Leaders of America Contest; Recipient of Southwestern Bell Public Talks Award; gave 37 speeches in 1983 and 29 speeches in 1984 to school, civic and professional groups. These speeches were given pursuant to her employment with Southwestern Bell. (Tr. 147); On the advisory board for the KARK-4 Community Services Awards from 1982-1983; Member of the Blue Cross/Blue Shield Subscriber's Advisory Council from 1977-1980; Volunteer work with critically burned children at Arkansas Childrens' Hospital. (CCC Exhibit 8).

29. *M. Douglas Wood*, is an officer, director and 20 percent shareholder of the company. (CCC Exhibit 2; Tr. 180-181). He currently resides in Sherwood, Arkansas. (CCC Exhibit 7; Tr. 178). Mr. Wood proposes to serve as business manager and general counsel of CCC's proposed station, devoting "in excess of 40 hours per week" to the position. (CCC Exhibit 2; Tr. 126). As business manager, Mr. Wood will be responsible for the business records, receiving and paying bills, keeping accounts and financial records of the television station, and performing any other duties assigned to him by the president or the chairman of the board of the company. (CCC Exhibit 2; Tr. 201). He believes he will report to Mr. Stewart, the president of the corporation. (Tr. 217). None of the other shareholders will report to him and he does not know if he will have any employees under him as business manager. (Tr. 217-218). He does not know what salary he will make or if he will make one. (Tr. 212). Mr. Wood testified that the services he would perform as general counsel for CCC could be done out of two of his current business offices. He does not believe that his position at the station as business manager and general counsel will require 40 hours of his time a week, at least initially. (Tr. 206).

30. Mr. Wood graduated from the East Detroit High School in 1960. He attended Arkansas State University and graduated with a B.S.E. in Chemistry in 1964. Mr. Wood was awarded a Juris Doctor degree from the University of Arkansas School of Law in 1973. (CCC Exhibit 7).

31. Mr. Wood is currently Chief Executive Officer of the Wood Law Firm in North Little Rock, Arkansas. He is engaged in the general practice of law with an emphasis on corporate, commercial, surety, transportation and tax law. (CCC Exhibit 7; Tr. 181, 203). The law firm was

founded in 1975 by Mr. Wood, and he has been the sole shareholder for the past four years. (CCC Exhibit 7; Tr. 202-203). Some of the other attorneys at the law firm have options to purchase stock in the firm. If they exercise those options, Mr. Wood will no longer be sole shareholder, but will remain controlling shareholder. (Tr. 205). From 1974 to 1975, he practiced law as a sole practitioner in North Little Rock. Mr. Wood was employed by the Commercial National Bank of Little Rock as an assistant trust officer from 1973 to 1974. (CCC Exhibit 7).

32. Mr. Wood presently devotes about 10 hours a day to the practice of law. There are eight attorneys employed by the firm and three attorneys of counsel. (Tr. 202). He maintains a business office at the law firm and one at his home. Although he does occasionally practice law from the office in his home, the majority of the time is spent at the law firm. (Tr. 205). Mr. Wood handles most of the construction litigation that comes to the law firm and tries most of the cases himself. (Tr. 214). He earns a salary from the hours he bills at the law firm, plus he receives a percentage of the profits earned by the company. If Mr. Wood were to cease billing hours at the law firm, the firm would earn less and the money he draws from the practice would diminish. (Tr. 212-213). He will not give up his law practice if CCC is granted the construction permit, but claims that his "...individual practice will diminish a great deal." (Tr. 207).

33. Mr. Wood also currently holds the office of State Representative for District 68, which encompasses North Little Rock. He has an office at the Capitol. (Tr. 205). As a State Representative, he has become a member of the following committees: 1) Public Transportation, 2) State Agencies and Governmental Affairs Committee, and 3) Urban Development Committee of National Conference of State Legislatures (special committee). (CCC Exhibit 7; Tr. 202). The State Legislature meets biennially for 60 days. The committees hold meetings in the interim. The standing committees meet once every other month, and the special committees meet about once a year in Washington, D.C. or other cities around the country. (Tr. 206-207, 220-221). Mr. Wood intends to maintain his position as State Representative should CCC be granted the construction permit, and he stated that he hopes to remain a State Representative as long as possible. He runs for office every two years. (Tr. 202, 221).

34. Mr. Wood is involved in the following civic organizations and activities: North Pulaski County Chamber of Commerce; The American Legion, Post Number 1; Sherwood-Sylvan Hills Optimist Club; North Pulaski County Bar Association; Pulaski County Bar Association; Arkansas Bar Association; American Bar Association; Association of Interstate Commerce Commission Practitioners; Distinguished Military Graduate, Arkansas State University, 1964; Outstanding Jaycee of the Year, North Hills Jaycees, 1972; Distinguished Service Award, North Hills Jaycees, 1977; Arkansas Outstanding Young Man Award, Arkansas Jaycees, 1977. (CCC Exhibit 7). The record does not show which, if any, of the activities Mr. Wood is presently involved in or the extent of his involvement or participation. It is not clear from the record which of these activities relate to or involve strictly Little Rock organizations.

35. *M. Harry Thomason*, is a director and 20 percent shareholder of the company. (CCC Exhibit 2; Tr. 229). He currently resides in Little Rock, Arkansas. (CCC Exhibit 9; Tr. 227). Mr. Thomason also owns a condominium in Los Angeles, California. He spent approximately one-third of his time in Los Angeles during 1985 and expects to spend about as much time there in future years. (Tr. 239).

36. Mr. Thomason proposes to serve as production manager of CCC's proposed station, devoting "in excess of 40 hours per week" to the position. (CCC Exhibit 2). Mr. Thomason clarified this to indicate that he would spend in excess of 40 hours weekly "working on television station business." (Tr. 228). He did not know what title he would hold in his position at the station, and that he cannot recall suggesting to the other shareholders that he adopt a particular title. (Tr. 245). He will report to Mr. Stephens, the proposed general manager. *Id.*As production manager, Mr. Thomason will be responsible for acquiring syndicated programming and producing programming. (Tr. 240-241; CCC Exhibit 2). He does not know how much programming the station will produce or how many employees he will have working under him for the production of local programming. No specific budget has been proposed for the production of local programming. (Tr. 241). An undetermined portion of the 40 hours a week Mr. Thomason proposes to devote to the station will be spent in Los Angeles, California. (Tr. 242).

37. Mr. Thomason graduated from Hampton High School in Hampton, Arkansas in 1958. He received a B.S.E. degree from Southern Arkansas University in Magnolia, Arkansas in 1962. From 1962 to 1966 Mr. Thomason worked on advanced degrees in education at the University of Arkansas and Arkansas A & M. (CCC Exhibit 9). Mr. Thomason taught drama and speech, and coached basketball for Hampton High School from 1962 to 1964. From 1964 to 1968 he taught drama and art and coached football and track at McLellan High School in Little Rock, Arkansas. (CCC Exhibit 9). In 1968 he founded Tronics, a Little Rock company in the business of producing advertising and television commercials for local and national accounts. (CCC Exhibit 9; Tr. 247). This company remained in operation until 1974. (Tr. 247). Afterwards, Mr. Thomason began doing contract work with Columbia Pictures for the production of feature films and mini series. In 1982, Mr. Thomason and his wife formed Mozark Productions, Inc., a company in the business of creating and producing movies and television shows. (CCC Exhibit 9; Tr. 247). Mr. Thomason has been involved in the production of numerous television series, feature films and "mini series." Mozark Productions is still in business and is currently involved in the production of a television pilot program for CBS scheduled to be aired in the fall of 1986. (Tr. 229). Mr. Thomason spent two out of the four weeks in the month of May 1986 in Los Angeles working on this project, and will spend half of July in Los Angeles as well. (Tr. 243). He will maintain his involvement in Mozark Productions if CCC is granted the construction permit. (Tr. 240). Mr. Thomason has done particular projects for television and radio stations on a contractual basis, but he has never been employed by a broadcast station either on a full-time or a part-time basis. The last contract work he did for a broadcast station occurred in the early 1970's. (Tr. 246).

38. Mr. Stephens was the first to contact all the other principals of CCC to inform them of the availability of channel 54 and to find out if they were interested in joining together on an application. He has long standing acquaintances with each of the other four principals. (Tr. 109). Mr. Wood was responsible for the incorporation of CCC, including the drafting of the articles of incor-

poration, the by-laws and the stock subscription agreements. (Tr. 181). He was also responsible for certifying that CCC is financially qualified. (Tr. 189).

39. The shareholders of CCC are uncertain how they will finance the corporation and operation of the proposed station. Their plan supposedly includes two options: 1) obtaining a bank loan or 2) selling additional equity through a public offering to the people of Arkansas. (Tr. 90-91, 121-122, 150-152, 186-188, 200, 230-231). Whether voting or nonvoting stock would be sold has not been discussed. Neither have the stockholders discussed what percentage of the vote the original shareholders would retain, individually or collectively, in the event of a sale of additional voting stock. (Tr. 113, 124-125).

Diversification of Ownership of Mass Media

40. Neither CCC nor any of its principals, with the exception of Mr. Stephens, has any ownership interest in any medium of mass communications. (CCC Exhibit 2). Mr. Stephens is president (CCC Exhibit 5, page 2) and shareholder (39.61% common voting stock) of Central Arkansas Television, Inc. (CATV). CATV is a 5 percent limited partner in the licensee of station KLRT(TV) in Little Rock, Arkansas. Mr. Stephens will resign as corporate officer and divest his ownership interest in CATV if CCC is granted the construction permit. (CCC Exhibit 3).

41. Shareholder Harry Thomason, as noted previously, owns one-half of Mozark Productions, Inc., a company in the business of creating and producing movies and television shows. (CCC Exhibit 9; Tr. 247). Mozark Productions has produced network series such as "Lime Street," and Mr. Thomason individually has served as producer of "The Fall Guy." "The Blue and the Grey," and "Designing Women." Mozark Productions is currently involved in the production of a television series for the CBS Television Network, scheduled to be aired in the fall of 1986. (Tr. 229).

Air Hazard Issue

42. At the time of the hearing, CCC had not yet obtained FAA approval of its site at the reduced height. (Tr. 26-27). However, by a filing made on October 14, 1986, CCC submitted a copy of FAA Form 7460-9, dated October 3, 1986, which states that the CCC proposal does not constitute a hazard to air navigation. The determination by the FAA becomes final on November 12, 1986 unless a petition to review such determination is filed by November 2, 1986. The Presiding Judge will take official notice of the FAA determination.

Ultimate Findings and Conclusions

43. This proceeding involves the mutually exclusive applications of LGP and CCC for a construction permit for a new television station in Little Rock, Arkansas. The *Designation Order* specified an air hazard issue against both LGP and CCC as well as the standard comparative issue.

Air Hazard Issue

44. Both applicants have demonstrated that their respective proposals will not constitute a hazard to air navigation. However, at the time of this writing, there was still a possibility that review of the FAA's favorable ruling regarding CCC's proposal could be sought prior to November 2, 1986. Thus, the favorable decision on the air hazard issue regarding CCC is based on the assumption that the FAA determination will become final. Therefore, the air hazard issue directed against both applicants is resolved in favor of the applicants. CCC has been directed to immediately notify the Commission if the FAA determination is reviewed. (See Order (FCC 86M-3141) of the Presiding Judge released October 23, 1986).

Comparative Issue

45. Evaluation of comparative applications is governed by the Commission's *1965 Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (hereinafter *Policy Statement*). The *Policy Statement* sets forth two major goals toward which the process of comparison should be directed: (1) the best practicable service to the public; and (2) a maximum diffusion of control of the media of mass communications.

46. The *Policy Statement* describes diversification of control of the media of mass communications as, "a factor of primary significance." *Id.* at 394. In evaluating the significance of media interests under diversification, media holdings in the proposed community of license will normally be of most importance, followed by other interests in the remainder of the service area, and finally, by interests in the nation generally. *Policy Statement* at 395. Other important factors to weigh are the degree of the applicants' ownership and control in these media, and their significance in terms of size and coverage, and in relationship to other media in their respective areas. Control of large interests elsewhere in the state or region may outweigh control of a small medium of expression (such as a weekly newspaper) in the same community.

Diversification

47. *Leininger-Geddes Partnership*: The applicant and its principals have no cognizable ownership in any medium of mass communications.

48. *Capitol Communications Corporation*: Neither CCC nor the CCC principals have any cognizable interest in any medium of mass communications. However, because Mr. Stephens owns an exceedingly small advertising agency in Little Rock which places advertising in newspapers and on broadcast stations in the proposed city of license and because Mr. Thomason owns a production company which produces programming which is aired nationally, LGP argues that such interests should be held against CCC under the diversification criteria.

49. In support of its position, LGP relies upon *Mid-Florida Television Corporation, et al*, 69 FCC 2d 607, paragraph 88 (1978). There, the Review Board took the position that while ownership of an advertising agency did not constitute ownership of another medium of mass communications, it nevertheless recognized that such ownership raised some potential conflict of interest problems. However, here the activities of Mr. Stephens' advertising agency is of such a de *minimis* nature, that its ownership by Stephens cannot reasonably be held to constitute a sufficient potential conflict of interest problem to be considered under the diversification criteria. *Midwest Broadcasting Company*, 70 FCC 2d 1489, 1499 (1979). The agency services at most " a couple of accounts" and under these circumstances, the matter lacks decisional significance in this proceeding.

50. With respect to Mr. Thomason, LGP argues that his ownership of a programming production company undermines the objectives underlying the principle of diversification of control. This, LGP argues, results from the fact that television programming produced by Thomason will

be shown on network stations in Little Rock. Thus, it is argued, Thomason will have an outlet in Little Rock, whereas LGP would have none.

51. The Review Board held in *Morris, Pierce & Pierce,* 88 FCC 2d 713, 723-724 (1981) that in the absence of a showing that an interest such as Thomason's would undermine maximizing available program services and viewpoints and preventing any undue concentration of economic power contrary to the public interest, it would be unwarranted to elevate a production company to the level of a medium of communications for purposes of the comparative evaluation. Here, while there is the possibility that some of Thomason's production company's programming will, at times, be shown in Little Rock on network stations, such an ownership interest in a production company on the part of a 20 percent stockholder is not sufficiently extensive to warrant a decisionally significant diversification preference in favor of LGP.

Best Practicable Service
Integration

52. In evaluating integration proposals, consideration must be given to the degree of integration of ownership and management and to the attributes of the participating owners - - including such matters as broadcast experience, local residence and past participation in civic affairs. Participation in station operation by owners is considered by the Commission to be a factor of substantial importance because "[i]t is inherently desirable that legal responsibility and day-to-day performance be closely associated."

53. *Leininger-Geddes Partnership:* LGP is awarded 100 percent quantitative integration for its proposal to integrate into management 51 percent general partner Dale Leininger as general manager, and 49 percent general partner Darrell Geddes as program director. Both positions are positions for which credit is awarded under the Policy Statement. LGP is a general partnership with a written partnership agreement, and each partner has a voice in the determination of partnership affairs commensurate with his stated ownership interest. In short, LGP has provided reasonable assurance to the Commission that its integration proposal will be discharged.

54. LGP is entitled to qualitative enhancement for the integration proposal of Darrell Geddes, who is Black and has been a resident of Little Rock for three years. [2]

55. *Capitol Communications Corporation:* CCC claims 100 percent full-time integration credit based on its proposal to integrate all five of its stockholders into the operation of the station. However, consideration of the findings leads to the conclusion that such integration credit is unwarranted.

56. Integration credit will not automatically be awarded on a naked claim where other objective evidence substantially undercuts that claim. *Knoxville Broadcasting Corporation,* FCC 86R-13, released March 19, 1986. In *Blancett Broadcasting Company,* 17 FCC 2d 227 (1969), the Review Board stated as follows:

> "While these principals, as professional or self-employed men, may possibly be able to arrange their schedules to fulfill their stated [integration] commitment, the very existence of their other interests renders questionable their commitments in the absence of an additional showing by the applicant of the reliability of its integration proposal in order to support the preference sought."

57. In the case of CCC, at least two of its stockholders who are proposing full-time integration cannot reasonably be expected to fulfill their respective commitments because of other interests. Mr. Wood is an active practicing lawyer. He is founder and present shareholder of a 10-member law firm and tries his own cases. He is a state legislator and has a 60-day biennial commitment to attend the legislature, as well as monthly committee meetings. He maintains an office at home, at his law firm, and at the state capitol. He proposes not to leave his elected office at the end of his term, with the voters' approval. Rather, he will seek reelection. While Mr. Wood has stated he would rearrange his present schedule and reduce his trial commitments, the totality of Wood's interests do not provide the Commission with the necessary reasoanble assurance that his commitment will be discharged. Because of Wood's significant interests, it cannot be expected that Wood will devote full-time on a day-to-day basis in a management position at the station. *Metro Broadcasting, Inc.,* 99 FCC 2d 688, 701 (1984). Of perhaps greater significance, Wood's proposed role as "general counsel," in addition to business manager, is more in the nature of a consultant position, not a policymaking function entitling him to integration credit. Finally, Mr. Wood acknowledged that he did not believe it would require 40 hours a week to perform his station duties, at least initially, and that he did not necessarily intend to perform such tasks on the station's premises. In view of the foregoing, Wood is only entitled to part-time credit for his proposal to serve as the station's business manager.

58. Similarly, Mr. Thomason's full-time integration proposal cannot be credited. Mr. Thomason, who is proposed as "production manager," is deeply involved in a production company which requires him to spend a great deal of time in Los Angeles, California. Indeed, during 1985, Mr. Thomason spent approximately one-third of his time in Los Angeles. He expects to spend a similar amount of time in Los Angeles in future years. Although Mr. Thomason proposes to spend 40 hours weekly on station business, he does not commit himself to spend any minimum amount of time at the station.

59. In view of Mr. Thomason's commitment to spend one-third of his time in Los Angeles, and his indefinite proposal as to the amount of time he will actually spend at the station, his full-time integration proposal is not deserving of credit. It has been held that integration credit requires a commitment to work at the station on a daily basis. In *Omaha TV 15, Inc.,* 102 FCC 2d 875, 881 (1985), the Review Board gave no integration credit for a principal who proposed to work 30 hours a week, three days a week. Because daily participation was not proposed, no credit was given. Here, Mr. Thomason will not be in Little Rock, Arkansas for substantial periods of time, and he has no commitment to work at the station on anything even remotely resembling a daily basis. Thus, CCC will be given no integration credit for Mr. Thomason.

60. LGP advances other arguments designed to further undercut CCC's integration credit. However, the Presiding Judge finds those arguments unsupported and unpersuasive. For example, LGP argues that because CCC stockholders have considered the sale of additional stock, the permanence of the CCC ownership structure is not secure for integration credit. But there is no showing that CCC will sell any additional voting stock so as to dilute the present voting interest of existing stockholders. Nor is there any showing that stock of any kind will in fact be

sold. The argument made by LGP is predicated on speculation because there is no definite and certain plan for CCC to sell additional stock. Thus, LGP's argument is rejected.

61. LGP would not credit the integration proposals of Mr. Stewart and Ms. Mitchell. However, LGP's argument that these stockholders will not fill management positions at the station is unpersuasive and it is rejected. Stewart's proposal to be assistant general manager and community relations director are management positions entitled to integration credit. Ms. Mitchell's proposal to serve as assistant station manager and national sales manager are management level positions entitled to integration credit. Thus, their proposals, as well as the proposal of Mr. Stephens, will receive credit.

62. To summarize, CCC will receive 60 percent full-time integration credit for Stephens, Stewart, and Mitchell; 20 percent part-time integration credit for Wood; and no integration credit for Thomason. Thus, there is a significant difference between the 60 percent full-time integration credit awarded to CCC and the 100 percent integration credit awarded to LGP. Because of this significant disparity, it is unnecessary to consider the qualitative attributes of the various principals. *Scott & Davis Enterprises, Inc.*, 88 FCC 2d 1090; *Van Buren Community Service Broadcasting, Inc.*, 87 FCC 2d 1018, 1022 (1981); *Radio Gaithersburg, Inc.*, 72 FCC 2d 820 (1980). The Presiding Judge will, however, note in passing, that the CCC stockholders are outstanding local citizens with extensive civic involvement.

63. Neither applicant is entitled to a preference under diversification. However, under the criteria of best practicable service, LGP's 100 percent full-time integration is deserving of a preference over the 60 percent full-time integration of CCC. Thus, under the existing comparative criteria, the application of LGP is preferred and the public interest will best be served by a grant of its application.

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken by a party or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the Rules, [3] the application of Leininger-Geddes Partnership for authority to construct a new commercial television broadcast station on Channel 42, Little Rock, Arkansas, IS GRANTED and the competing application of Capitol Communications Corporation, IS DENIED;

IT IS FURTHER ORDERED that the grant to Leininger-Geddes Partnership is subject to final Commission action in MM Docket No. 84-82 (RM-4901).

FEDERAL COMMUNICATIONS COMMISSION

Joseph Stirmer
Administrative Law Judge

FOOTNOTES

[1] The application of Maumelle TV was dismissed with prejudice by *Order* (FCC 86M-979) of the Presiding Judge released March 18, 1986. The application of U.S. McPherson d/b/a Magnolia Communications was dismissed with prejudice by Order (FCC 86M-2140) of the Presiding Judge released June 30, 1986.

[2] The Presiding Judge is cognizant of the Commission's position regarding female and minority preferences expressed in the Brief filed September 12, 1986 before the United States Court of Appeals for the District of Columbia Circuit in *James U. Steele v. FCC*, No. 84-1176. As will be noted herein, the decision in this case does not rest on qualitative factors.

[3] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-13

HILLEBRAND BROADCASTING, INC. Sanibel, Florida	File No. BPH-830217AI
GUMBO LIMBO BROADCASTING, INC. Sanibel, Florida	File No. BPH-830601AC
RIVIERA COMMUNICATIONS-SAMIBEL, INC. Sanibel, Florida	File No. BPH-830714AE

For Construction Permit for a New FM Station

ORDER

Adopted: October 24, 1986; Released: November 6, 1986

By the Commission: Commissioner Quello concurring in the result.

1. The Commission has before it: (a) an Application for Review of a Review Board Memorandum Opinion and Order[1] filed December 23, 1985, and supplemented on December 24, 1985, by Punta Ybel Communications, Ltd. (Punta Ybel); (b) Oppositions to (a) filed January 7, 1986, by Hillebrand Broadcasting, Inc. (Hillebrand) and Riviera Communications-Sanibel, Inc. (Riviera); (c) a Request for Prompt Commission Action filed August 1, 1986, by Hillebrand, Riviera and Gumbo Limbo Broadcasting, Inc.; (d) a Motion to Strike (c) filed August 13, 1986 by Punta Ybel; and (e) an Opposition to (d) filed August 21, 1986 by Hillebrand, Riviera, and Gumbo Limbo.[2] The Review Board opinion at issue affirmed the dismissal of Punta Ybel's application by the Presiding Administrative Law Judge (ALJ).[3]

2. We fully concur in the result of the Board's Decision in this case and in most of the reasoning stated therein. However, we believe that comment is warranted with regard to one aspect of that Decision. Thus, in conjunction with its affirmance of the ALJ's grant of a motion to dismiss,[4] the Board noted that Punta Ybel had failed to comply with various procedural deadlines throughout the course of this proceeding. We agree with the Board that prosecution of an application means timely compliance with procedural and substantive rules, including ALJs' orders, *Vue-Metrics, Inc.*, 69 F.C.C. 2d 1049, 1058 (1978), and that the repeated deficiencies reflected in this record undermine Punta Ybel's claim of a good faith intent to prosecute its application. Nonetheless, it must be recognized that there have been instances in the past where such deficiencies have not been deemed sufficient to warrant outright dismissal of an application and that applicants' temporizing acitivites have been indulged on occasion. Having said this, we wish to make it clear that times have changed and so has Commission policy.

3. For some time now there has been a growing interest in new and expanded communications services, as reflected in an increasing number of applications, and, more importantly, a demonstrated public demand for such services. Hence, we have placed a greater emphasis on our responsibility to provide service to the public in the most efficient, expeditious manner possible and on the fact that delaying the initiation of new service disserves the public interest. To carry out this objective, we have instituted in some services entirely new procedures for awarding licenses (lotteries) and in other services have changed significantly existing procedures for processing applications. *Cf.*, for instance, *Report and Order*, 58 RR 2d 776, FCC 85-125, released May 6, 1985, establishing a "hard look" approach for handling of FM and TV applications. Furthermore, we have also, among other things, made significant changes in the way the Commission conducts its comparative hearing proceedings so as to achieve more efficiency and an expeditious point of finality. *See, Report and Order*, 72 FCC 2d 202 (1979).[5] In doing so, we determined that the effective and expeditious dispatch of the Commission's business is, in itself, an integral part of the public interest. Consistent with this determination that new service should be provided to the public in the most efficient, expeditious manner possible, ALJs must be given broad discretion to regulate the course of multiparty comparative hearings.[6] Here, the ruling in question is clearly within the bounds of the authority delegated to ALJs as well as fully in accord with our current policies. In view of the foregoing and the specific facts concerning Punta Ybel's failure to respond in any way to the motion seeking dismissal of its application following a series of other deficiencies, we find no error in the rulings below.

4. IT IS ORDERED, That, pursuant to Section 5(c)(5) of the Communications Act of 1934, as amended, and Section 1.115(g) of the Commission's Rules, the Application for Review filed December 23, 1985, and supplemented on December 24, 1985, by Punta Ybel Communications, Ltd. IS DENIED.

5. IT IS FURTHER ORDERED, That the Motion to Strike filed March 27, 1986, by Hillebrand Broadcasting, Inc. IS GRANTED and the Motion to Supplement Application for Review filed March 21, 1986, by Punta Ybel Communications, Ltd. IS DENIED.

6. IT IS FURTHER ORDERED, That the Request for Prompt Commission Action filed August 1, 1986, by Hillebrand Broadcasting, Inc., Gumbo Limbo Broadcasting, Inc. and Riviera Communications-Sanibel, Inc. and the Motion to Strike filed August 13, 1986 by Punta Ybel Communications, Ltd. ARE DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

FOOTNOTES

[1] *Hillebrand Broadcasting, Inc.*, 102 F.C.C. 2d 804 (1985); *recon. denied*, 102 F.C.C. 2d 809 (1985).

[2] Punta Ybel also filed a Motion to Supplement Application for Review on March 21, 1986 and Hillebrand filed a Motion to Strike Punta Ybel's motion on March 27, 1986. Since Punta

Ybel's motion is essentially a Reply to Hillebrand's Opposition to Punta Ybel's Application for Review, it is an unauthorized pleading. *See* Section 1.115(f) of our Rules. Therefore, we shall grant Hillebrand's Motion to Strike and deny Punta Ybel's Motion to Supplement Application for Review.

[3] FCC 85M-2735, released July 10, 1985.

[4] The ALJ waited 28 days before acting on the motion without receiving any response from the applicant, which had itself been served with a copy of the pleading.

[5] Section 4(j) of the Communications Act of 1934, as amended, authorizes the Commission to conduct its proceedings in such a manner as will best conduce to the proper dispatch of its business and to the ends of justice. In this regard, it is important to note that the Commission's comparative licensing proceedings, such as this one, are markedly different from court proceedings involving tort actions. In the latter, the *rights* of the litigants are being adjudicated and appropriate redress may be ordered based thereon. However, while adjudicatory in nature, a comparative licensing proceeding is merely another procedure utilized by the Commission as a means of selecting the best qualified applicant to operate a broadcast station. Consequently, we find inapposite those court cases *(Jackson v. Washington Monthly Co.,* 569 F. 2d 229 (1977) and *Butler v. Pearson,* 636 F. 2d 526 (1980) cited by Punta Ybel for requiring a reinstatement of its application. Nor do we believe that a more recent D.C. Circuit Court opinion would require us to take such an action *(William C. Shea v. Donohoe Construction Co., Inc., No. 85-5931, July 18, 1986).*

[6] We emphasize that we do not lightly affirm the dismissal of an application where, as here, the failures are those of counsel and not the applicant. Counsel is the applicant's agent, however, and the applicant is bound by counsel's actions. Thus, although it is counsel rather than applicants who generally appear before us in these matters, they do so on behalf of their applicants. Were we to excuse all failures of counsel, we would leave our ALJs with no power to control proceedings. This would severely hinder the efficiency of our proceedings, particularly those involving multiple parties, which in turn would be unfair to the other applicants and would delay service to the public. We believe it is appropriate, therefore, to expect that applicants will choose their counsel with care and know that they will suffer the consequences if they are represented by counsel who do not vigorously prosecute their applications.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Policy Regarding Character Qualifications in Broadcast Licensing	Gen. Docket No. 81-500
Amendment of Rules of Broadcast Practice and Procedure Relating to Written Responses to Commission Inquiries and the Making of Misrepresentations to the Commission by Permittees and Licensees	BC Docket No. 78-108

MEMORANDUM OPINION AND ORDER

Adopted: October 16, 1986; Released: November 6, 1986

By the Commission: Commissioner Dennis not participating.

Background

1. The Commission has before it various petitions which seek reconsideration or clarification of the *Report, Order and Policy Statement* (" *Policy Statement* ")[1] revising our policies on the character qualifications of broadcast applicants.[2] These petitions essentially question the propriety of applying the new policies to cases under review on the *Policy Statement's* effective date. Petitioners also claim that the public interest requires consideration of character issues on a comparative basis in licensing proceedings, as well as inquiry into alleged antitrust misconduct prior to final adjudication. In addition, clarification is requested regarding attribution of misconduct between corporate applicants and their unincorporated divisions. The Commission received no oppositions or replies to these petitions.[3]

Alden's and KTC's Petitions

2. *Retroactivity of Policy Statement.* In the *Policy Statement*, we stated that the new policies would be applied to pending proceedings. Specifically, we said that "[a]ll proceedings which are currently before the Commission, its staff, or any other Commission body should, where appropriate, be resolved consistent with the policies set forth" in the new *Policy Statement*, including appeals of Review Board decisions pending before the Commission on the *Policy Statement's* effective date.[4] Both Alden and KTC contend that this aspect of the Commission's *Policy Statement* should be reconsidered, at least insofar as it eliminates character as a comparative factor in hearings between applicants for broadcast stations. Alden, a mutually exclusive applicant for new television stations in three separate comparative proceedings, contends that a retroactive change in policy deprives it of due process. In this regard, Alden alleges that, in filing and prosecuting its application, it relied upon the *1965Policy Statement on Comparative Broadcast Hearings*,[5] which provided for comparative preferences or demerits on character grounds. Our new *Policy Statement*, Alden asserts, deprives it of these benefits. Accordingly, Alden proposes that this policy be applied only on a prospective basis.

3. Similarly, KTC contends that our decision to eliminate character as a comparative consideration in licensing proceedings should not be applied to cases that have been litigated but are still under review by the full Commission. KTC claims that "such a retroactive application of a policy, even if legally permissible, would be injurious to the parties and to the public. . . ."[6] The public interest would be harmed, KTC asserts, because failure to consider character on a comparative basis may enable applicants who have previously been assessed comparative demerits to prevail in hearings.

4. We will not alter our previous determination as to the proper scope of application of the *Policy Statement*. Cases on appeal before the full Commission will be governed by the *Policy Statement*, including our new policy deleting consideration of character issues on a comparative basis.

5. First, as the *Policy Statement* explains, our application of the new character standards to pending proceedings comports with the traditional judicial practice of deciding cases in accordance with principles in effect at the time of the decision. This approach necessarily results in a limited retrospective application of the criteria to cases under review at the time the new policies became effective. However, this is permissible and does not violate due process. As the Court of Appeals for the District of Columbia Circuit has stated, "an agency cannot be required to apply a policy it has rejected. Such a requirement would amount to a command to the agency to disregard its statutory mandate: it would have to employ a policy that, by its own determination, did not serve the public interest."[7] Since we determined that our prior approach to character warranted modification because it no longer served the public interest, it is appropriate to apply the new policies to pending proceedings.[8]

6. Second, this approach is consistent with past Commission practice. Specifically, in adopting the *Policy Statement on Comparative Broadcast Hearings* in 1965, we decided to apply these new policies to pending cases, including those cases under review on its effective date.[9] Similarly, in eliminating the suburban community policy, the *Berwick* doctrine, and the *de facto* reallocation policy, we found that the public interest would best be served by applying the new standards to pending cases, including appeals of Review Board decisions pending at the time these new policies became effective.[10] Moreover, in that proceeding, we specifically rejected arguments similar to those advanced by KTC and Alden, finding that application of these new policies to pending cases did not violate any hearing rights of applicants. Accordingly, KTC's and Alden's requests for reconsideration of the application of the *Policy Statement* are denied.[11]

7. *Elimination of Character Issues on a Comparative Basis.* KTC also requests reconsideration of the Commission's decision to exclude character issues from consideration as comparative factors in broadcast licensing hearings between mutually exclusive applicants. Although KTC has no quarrel with the Commission's desire to eliminate trivial inquiries into alleged character deficiencies, KTC contends that refusing to consider character issues on a comparative basis could result in applicants with very serious character defects obtaining grants. Consequently, KTC asks the Commission to reinstate its former policy of awarding character demerits on

comparative basis. In the alternative, if character issues are considered only for purposes of an applicant's basic qualifications to be a licensee, KTC suggests the Commission provide that certain defects, which were formerly considered to be less than disqualifying, now warrant disqualification under the new policy.

8. We will deny KTC's requests. As the *Policy Statement* clearly provides, we have eliminated consideration of character on a comparative basis because we could no longer justify comparative evaluation. Specifically, we found that comparative character evaluation would increase the cost, complexity, length, and subjectivity of comparative hearings without sufficient benefit, particularly in light of the new guidelines concerning matters that would be deemed relevant to an applicant's character. However, we have retained character as a basic qualifications issue. In this regard, applicants with alleged character defects will still have to establish that they possess sufficient basic qualifications to become Commission licensees. This inquiry will include relevant FCC-related misconduct and non-FCC misconduct as set forth in our *Policy Statement*. Moreover, contrary to petetioner's assertions, this approach will prevent applicants with character defects from becoming licensees. In fact, we note that, since the *Policy Statement's* adoption, there have been at least three instances where applicants for renewal of license or a construction permit have been disqualified on the basis of character defects.[12] Finally, we reject petitioner's suggestion that we alter our standard for considering character as a basic qualifications issue. Having determined that the public interest does not warrant consideration of non-disqualifying character issues on a comparative basis, it would make no sense to now consider those same types of character issues as disqualifying.[13] Accordingly, KTC's request for reconsideration of our policy deleting character on a comparative basis is denied.[14]

UCC's Petition

9. UCC asserts that our *Policy Statement* limits the scope of relevant misconduct in the broadcast field to violations of the Communications Act or of the Commission's rules or policies. UCC believes that this is not permissible because the Commission cannot categorically specify every broadcast related activity which may contravene the public interest. However, the scope of relevant misconduct in the broadcast field is not as limited as UCC believes. Rather, the *Policy Statement* states, in pertinent part, that non-FCC misconduct, which may in some cases be germane to the Commission's character inquiry, "may include broadcast station related misconduct *not specifically proscribed by the Act or the Commission*."[15] Indeed, the *Policy Statement* provides that the Commission "will be concerned with misconduct which violates the Communications Act or a Commission rule or policy, *and with certain specified non - FCC misconduct* which demonstrate the proclivity of an applicant to deal truthfully with the Commission and to comply with our rules and policies."[16] In other words, misconduct in the broadcast field which does not violate the Communications Act or the Commission's rules or policies is still relevant for purposes of determining character qualifications of broadcast applicants provided that there has been an adjudication and it falls into one of the categories of relevant non-FCC misconduct.[17] Consequently, it is incorrect for UCC to assert that, in the broadcast field, we have narrowed the scope of Commission inquiry solely to violations of the Communications Act or of our rules and policies. Moreover, we also indicated that, if circumstances warrant, we would revisit the question of modifying the scope of non-FCC related misconduct that would be considered relevant for determining character qualifications.[18]

10. *Anticompetitive Misconduct.* UCC next characterizes the policy on antitrust and anticompetitive practices established in the *Policy Statement* as egregious error. Petitioner asserts that the public interest standard of the Communications Act primarily embraces concerns over potential monopolistic practices in broadcasting and requires consideration of allegations of anticompetitive or antitrust activities whether or not there has been an adjudicated violation of the antitrust laws. In support of this proposition, UCC cites *NBC v. U. S.*,[19] *FCC v. Sanders Brothers Radio Station*,[20] and *FCC v. National Citizens Committee for Broadcasting* (NCCB).[21] We disagree. Although the Commission has been, and will continue to be, concerned with broadcast-related anticompetitive practices by its licensees and applicants, these activities are only one factor that the Commission weighs in determining whether the grant of any application would serve the public interest.[22] Further, the great weight of authority does not support the petitioner's assertion that the Commission is required to consider allegations of anticompetitive activities, even when such activities have not been considered in any other forum. Indeed, Supreme Court cases cited by the petitioner hold that the Commission's authority to scrutinize allegations of anticompetitive or antitrust activities *is permissive and not mandatory*.[23]

11. Our *Policy Statement* expresses concern over the public interest ramifications of broadcast related anticompetitive practices by licensees and applicants and states our intention to consider adjudicated violations of antitrust laws in connection with character inquiries in licensing proceedings. This change in policy was based upon a balancing of several considerations. First, it reflects our belief that, where broadcast-related activity does not violate state or federal antitrust or anticompetitive laws or Commission rules or policies, licensees should not be penalized for engaging in activities that meet the requirements of law. Second, it takes into account that concerns with anticompetitive and antitrust activity in broadcasting have occupied a unique position in the Commission's regulatory scheme and that such activity may be predictive of an applicant's proclivity to comply with Commission rules and policies. Third, this change in policy recognizes that the Commission is not the appropriate agency to engage in the initial investigation, adjudication, or enforcement of the antitrust laws. We continue to believe that these reasons warrant our change in policy. Moreover, UCC has cited no errors of fact or law in the Commission's decision which justify or necessitate reconsideration of that decision.[24]

CBS Petition

12. CBS requests the Commission to clarify the *Policy Statement* by indicating that we "will, in reaching licensing decisions, consider non-FCC related misconduct by the nonbroadcast *divisions* of an applicant corporation to the same extent as we would [consider] such misconduct by an applicant's nonbroadcast subsidiary, parent, or related subsidiary corporations."[25] CBS believes that its proposed clarification would fill a gap in the *Policy Statement*

while at the same time advancing the *Policy Statement's* purpose of limiting the scope of character inquiries to areas which are relevant to the Commission's licensing goals. CBS asserts that corporate applicants should have the ability to follow their business judgments in adopting divisional structures, without having to concern themselves that such decisions may be subjected to harsher treatment in licensing proceedings. In support, CBS cites *Copperweld v. Independence Tube Corp.*,[26] noting that the Supreme Court has warned against the creation of policy which "imposes grave legal consequences upon organizational distinctions that are of *de minimis* meaning and effect." Accordingly, CBS believes that there should be no difference in consequence whether non-FCC related misconduct occurs at a nonbroadcast division of a corporate applicant or at a related nonbroadcast subsidiary in terms of attributing this misconduct to a corporate applicant.

13. After reviewing CBS' petition, we conclude that its suggested clarification is not warranted. In setting forth policies regarding the attribution of non-FCC related misconduct between parent companies and their broadcast subsidiaries, or between broadcast subsidiaries and related nonbroadcast subsidiaries, the Commission sought to exclude, generally, such misconduct from consideration in broadcast licensing proceedings unless there were common principals actively involved in the day-to-day operations of the broadcast subsidiary. Even under these circumstances, the Commission would focus on the actual involvement of the common principals in both the misconduct and the day-to-day activities of the broadcast subsidiary. Moreover, mitigating factors would be taken into account in assessing the significance of the misconduct on the applicant's broadcast operations, such as corporate actions to "neutralize" the misconduct and to prevent its reoccurrence. Underlying this approach was the Commission's view that misconduct should not be attributed unless there is a sufficient nexus between the broadcast subsidiary and the nonbroadcast parent company or related subsidiary. We continue to hold that this is a reasonable basis for considering misconduct by parent companies and nonbroadcast subsidiaries, and CBS appears to concur with this view.

14. However, we do not believe that it would be appropriate to extend this policy to misconduct that occurs at the nonbroadcast division of a corporate applicant. Although CBS asserts that separate divisions of a corporation generally have separate officers and employees and that corporate divisions should be considered as "autonomous" as subsidiary corporations, we do not have sufficient information in the record of this proceeding to draw such conclusions. Rather, it is a well established principle of corporation law that a corporate subsidiary has a separate identity from its parent company "whereas unincorporated departments or parts of a corporation are not entities separately considered."[27] Furthermore, corporate divisions are traditionally treated as part of the same corporation for tax and accounting purposes and not as separate, corporate units. Consequently, we will not grant CBS' request.[28] However, we do not intend by this decision to cause those kinds of structural changes in licensees which are changes in form only, not in substance. Consequently, if the extent of separation and insulation between an applicant corporation and a nonbroadcast division is analogous to that existing between a licensee corporation and its parent corporation or a related subsidiary corporation, then we will not preclude an applicant from making such a showing and requesting that non-FCC related misconduct occurring at a nonbroadcast division should be governed by the same standards as if the misconduct occued at a parent company or a related subsidiary. Such a showing could be made in an application or during a hearing, and the burden would be on the corporate applicant to demonstrate that its nonbroadcast division is the functional equivalent of a related subsidiary for purposes of attributing misconduct.[29]

SPACE's Petition

15. *Broadcast Networks.* SPACE, a nonprofit organization representing a variety of groups involved with the manufacture or use of satellite earth station reception equipment, seeks reconsideration or clarification of our *Policy Statement* in three remaining respects. First, SPACE requests the Commission to clarify that the *Policy Statement* does not overturn Commission and court precedent upholding the regulation of broadcast network practices. In this regard, SPACE suggests that the *Policy Statement* could be interpreted as a relaxation or deregulation of Commission oversight of the practices of broadcast networks. Consequently, SPACE asks us to clarify that the *Policy Statement* does not preclude private parties from raising questions concerning network practices in licensing proceedings.

16. At the outset, we note that SPACE has not cited the basis in the *Policy Statement* that has prompted its requested clarification. As a result, we perceive no need for any extended discussion. Nevertheless, we note that the Commission presently has regulations affecting practices by broadcast networks. For example, Section 73.658 of the Commission's Rules contains, *inter alia*, restrictions on the amount of network programming affiliated stations may air in prime-time hours.[30] It also prohibits, with certain specified exceptions, networks from syndicating or having a financial interest in the programs they air. Further, it affects the content of network affiliation agreements. The *Policy Statement* in no way modifies these rules. On the contrary, a violation of these and any other pertinent rules is a relevant area of concern in broadcast licensing proceedings because such misconduct is "FCC-related." As the *Policy Statement* explains, violations of the Communications Act or of FCC rules or policies are considered for purposes of character inquiry because they are probative of applicants' honesty and reliability for future compliance with Commission rules or policies. Moreover, certain types of non-FCC misconduct would also be relevant, including violations of the antitrust laws that are broadcast related, if there has been a final adjudication. Finally, we note that networks are often multiple station licensees, and, like any other multiple owner, any misconduct within the parameters of this *Policy Statement* could have an effect on other commonly owned stations.[31]

17. *Satellite Cable Networks.* SPACE also requests the Commission to clarify that the *Policy Statement* does not preclude inquiry into the programming and distribution practices of satellite cable networks in broadcast licensing proceedings.[32] In support of its request, SPACE alleges that these cable networks are injuring earth station owners by scrambling their signals and by engaging in various anticompetitive practices. We will deny SPACE's request since it is beyond the scope of this proceeding. We note that satellite cable networks, like any other entities which may apply for broadcast licenses, are subject to our *Policy*

Statement for purposes of determining character qualifications. However, at the present time, the Commission has no regulations or policies specifically affecting satellite cable networks.[33] Consequently, this is not the appropriate forum for the Commission to decide what type of regulations, if any, should apply to satellite cable networks, or to consider the character-related implications of the conduct alleged by SPACE.

18. *Scope of Policy Statement.* As a final matter, SPACE petitions the Commission to clarify the applicability of the *Policy Statement* to common or private common carriers. Citing a recent common carrier case in the Domestic Public Land Mobile Radio Service ("DPLMRS"),[34] SPACE asserts that we improperly broadened the scope of our *Policy Statement* to include common carriers. However, this interpretation is incorrect. As we have consistently stated in both the *Notice of Inquiry*,[35] and in the subsequent *Policy Statement* in this proceeding, these new policies apply only to applicants for broadcast licenses. Indeed, common carriers are distinguished from broadcasters for purposes of character qualifications because no content regulation is involved[36] and because such issues are adjudicated on a case-by-case basis without the guidance of a specific policy statement. As a result, reference is occasionally made in common carrier cases to broadcast policies and precedents as aids in resolving character issues.[37] Consistent with this approach, the case cited by petitioner, *Baker Protective Services, Inc.*, involved, *inter alia*, the issue of whether antitrust violations by a related subsidiary and a parent company should be attributed to a renewal applicant in the DPLMRS service. In resolving this question, the Review Board applied policies established by our *Uniform Policy on Violations of Laws*,[38] concluding that the misconduct should not be attributed. Thereafter, we affirmed this decision, noting that "[n]othing in our new character policy statement [which superseded the *Uniform Policy*] would dictate a different result herein."[39] This reference to the broadcast *Policy Statement* was thus merely a supporting reason for affirming the Review Board's decision and not an extension of our broadcast policies to common carriers.

19. *Conclusion.* After carefully reviewing the petitions for reconsideration, we reaffirm that the public interest is best served by revision of our policies and rules on character qualifications as set forth in the *Policy Statement*. Moreover, the petitioners have not demonstrated any errors of fact or law that would warrant its modification.

20. The requirements contained in this *Memorandum Opinion and Order* have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or record keeping, labeling, disclosure, or record retention requirements; and will not increase or decrease burden imposed on the public.

21. Accordingly, IT IS ORDERED, That the Petitions for Reconsideration filed by Alden Television Inc., and Alden Communications Corp., CBS Inc., Satellite Television Industry Association, Inc., and The Office of Communication of the United Church of Christ and Telecommunications Research and Action Center ARE DENIED.

22. IT IS FURTHER ORDERED, That the Petition for Reconsideration filed by Kannapolis Television Company IS DISMISSED as described above and IS DENIED IN ALL OTHER RESPECTS.

23. IT IS FURTHER ORDERED, That the Motion to Strike filed by Community Action Communications, Inc., IS GRANTED IN PART and IS DENIED IN ALL OTHER RESPECTS.

24. Authority for this action is contained in Sections 4(i), 303(g), 303(r), and 405 of the Communications Act of 1934, as amended.

25. For further information concerning this proceeding, contact Andrew J. Rhodes, Mass Media Bureau, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

FOOTNOTES

[1] 102 FCC 2d 1179 (1986), 51 Fed. Reg. 3049 (January 23, 1986), *petition for review pending sub nom. National Association for Better Broadcasting v. FCC*, No. 86-1179 (D.C. Cir. filed March 17, 1986). On May 16, 1986, the court granted the Commission's motion to hold the review proceedings in abeyance pending action on the petitions for reconsideration.

[2] The petitions were filed on behalf of the following groups: (1) Kannapolis Television Company (KTC); (2) Alden Television, Inc., and Alden Communications Group (Alden); (3) CBS, Inc. (CBS); (4) The Office of Communication of the United Church of Christ and the Telecommunications Research and Action Center (hereinafter jointly referred to as UCC); and (5) SPACE, the Satellite Television Industry Association (SPACE).

[3] However, a motion to strike KTC's petition was filed on behalf of Community Action Communications, Inc. (CAC). KTC and CAC have been competing applicants for a new television station in Kannapolis, North Carolina, and at the time KTC's petition was filed, the grant of a construction permit to KTC was under review by the Commission. In its motion, CAC contends that KTC's petition for reconsideration should be stricken because it improperly raises the merits of character issues that are pending in the Kannapolis television proceeding. We will grant the motion in part and deny it in all other respects. Consistent with precedent, we will consider KTC's petition only to the extent that it suggests changes in our character policies on a general basis, and, in all other respects, the petition is dismissed. *See, e. g., Policy Statement*, 102 FCC 2d at 1235 n.128.

[4] *Policy Statement*, 102 FCC 2d at 1235. Pursuant to paragraph 122 of the *Policy Statement*, the new policies became effective upon publication in the Federal Register. *See* note 1, *supra*.

[5] 1 FCC 2d 393 (1965).

[6] Petition for Reconsideration, filed by KTC at 5 (February 24, 1986) [hereinafter referred to as "KTC Petition"].

[7] *Washington Association for Television and Children v. FCC*, 665 F.2d 1264, 1268 (D.C. Cir. 1981). In this case, the court held that it would be an "idle and useless formality" to remand the case to the Commission to determine whether it had properly applied its "Top 50 Market Policy," when that policy had been deleted by the Commission.

[8] We note that on June 19, 1986, KTC filed, along with other parties, a joint request for settlement of its comparative hearing proceeding for a new television station in Kannapolis, North Carolina. *See* note 3, *supra*. The Commission subsequently rejected the settlement agreement, finding CAC unqualified to be

a licensee on character grounds. The Commission also granted the construction permit to KTC. *See Memorandum Opinion and Order*, FCC 86-444, adopted October 15, 1986.

[9] *See Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d at 399-400.

[10] *See Report and Order* in Docket 82-320, 93 FCC 2d 436, 457-58 (1983), *recon. denied*, 56 RR 2d 835 (1984), *aff'd sub nom. Beaufort County Broadcasting Company v. FCC*, 787 F.2d 645 (D.C. Cir. 1986).

[11] Similarly, we reject KTC's contention that application of our policy deleting character issues on a comparative basis to pending appeals before the Commission will harm the public interest. KTC has submitted no evidence on this point. Its arguments are based on mere speculation. It is well established that, pursuant to Section 1.429 of the Commission's rules, 47 C.F.R. Section 1.429 (1985), this is not a sufficient basis for granting reconsideration.

[12] *See Mid - Ohio Communications, Inc.*, 60 RR 2d 986 (Rev. Bd. 1986)(pattern of willful and repeated violations of the Commission rule requiring applicants to report substantial and significant changes in information furnished in pending applications, lack of candor, and misrepresentations by renewal applicant warranted disqualification nothwithstanding voluntary dismissal of competing application); *RKO General, Inc.*, MM Docket No. 84-1057, FCC 86D-47 (Contingent I.D., released July 23, 1986)(two applicants in comparative renewal proceeding disqualified for misrepresentation and lack of candor); *Catoctin Broadcasting Corp. of New York*, FCC 86D-52, released August 22, 1986 (renewal application denied as "dishonest, untrustworthy, and unreliable.")

[13] *See Policy Statement*, 102 FCC 2d at 1231.

[14] Subsequent to the release of our *Policy Statement*, the Review Board suggested that demerits for character issues may be assessed in some circumstances in broadcast comparative hearings. *See Professional Radio, Inc.*, 59 RR 2d 1173, 1178 n.11 (Rev. Bd. 1986). Thereafter, in a separate comparative proceeding, we clarified that this suggestion is incorrect in view of the clear language of the *Policy Statement* that character qualifications will no longer be considered on a comparative basis. *See Broadcast Associates of Colorado*, 60 RR 2d 721, 723 n.5 (1986).

[15] *Id.* at 1183 n.11 (emphasis added).

[16] *Id.* at 1190-91.

[17] The categories of relevant "non-FCC related misconduct" include: (1) misrepresentations to any other governmental unit, resulting in criminal or civil violations; (2) criminal convictions involving false statement or dishonesty; (3) felony convictions not involving fraudulent conduct provided that there is a *substantial relationship* between the conviction and the applicant's proclivity to be truthful and comply with the Commission's rules; and (4) adjudicated violations of anticompetitive or antitrust laws that are broadcast related.

[18] *See Policy Statement*, 102 FCC 2d at 1208 n.75.

[19] 319 U.S. 109, 222-24 (1943).

[20] 309 U.S. 470, 474 (1940).

[21] 436 U.S. 775 (1978).

[22] *See Policy Statement*, 102 FCC 2d at 1200-03. *See also Black Citizens for a Fair Media v. FCC*, 719 F.2d 407 (1983), in which the court rejected petitioner's argument that the public interest standard mandated inclusion in license renewal applications of questions concerning programming performance. Therein, the court stated:

> Petitioners contend, in effect, that an empowering statute that explicity grants the Commission broad authority must be read implicitly to impose a highly specific duty. Without more, this is a dubious propositon.

In the instant case, the proposition is no less dubious.

[23] *See, e. g., NBC v. U. S.*, 319 U.S. at 222, where the Supreme Court analyzed the legislative history of the Radio Act of 1927 as well as the Communications Act of 1934 and determined that consideration by the Commission of *even an adjudicated violation* of antitrust laws was discretionary, and not mandatory: "The Commission was thus *permitted to exercise its judgment* as to whether *violation* of the antitrust laws disqualified an applicant from operating a station in the 'public interest'" (emphasis added); *U. S. v. RCA*, 358 U.S. 334, 343 (1959), where the Court stated that Congress had amended the Communications Act " *merely to authorize rather than to require* the revocation of a license by the Commission *after a court had found* a radio broadcaster *in violation* of the antitrust laws" (emphasis added); and *FCC v. NCCB*, 436 U.S. at 795, where the Court stated that the Commission " *is permitted* to take antitrust policies into account in making licensing decisions pursuant to the public interest standard." *But see Philco Corporation v. FCC*, 293 F.2d 864 (D.C. Cir. 1961) which held that a hearing was required regarding unadjudicated antitrust misconduct by an applicant for license renewal under our former character policies. In reaching this result, the court stated that "competitive practices may make an applicant unworthy [of license renewal] whether or not they violate the antitrust laws." *Id.* at 868. However, *Philco* relies primarily on *NBC v. U. S., supra*, and does not offer independent support that there is a statutory requirement to consider business practices that do not amount to adjudicated violations of the antitrust laws. We believe, therefore, that *Philco* does not preclude the Commission from finding that the public interest is no longer served by its former policy. *See also Policy Statement*, 102 FCC 2d at 1202 n.53.

[24] Similarly, SPACE alleges in its petition that the Commission should inquire into unadjudicated antitrust allegations that are communications- related. However, we will deny SPACE's request for the same reasons set forth above.

[25] Petition for Reconsideration and Clarification, filed by CBS, at 1 (February 14, 1986)(emphasis added).

[26] 467 U.S. 752, 773 (1984)(quoting *Sunkist Growers, Inc. v. Winkler & Smith Citrus Products* Co., 370 U.S. 19, 29 (1962)).

[27] *See 1 W. Fletcher, Cyclopedia of the Law of private Corporations*, Section 25 at 306 (rev. perm. ed. 1983).

[28] The *Policy Statement* also holds that individual acts of non-FCC misconduct by officers and employees of a parent company or a related subsidiary would not be attributed to a corporate applicant unless the individual (1) has an attributable interest in the applicant corporation or the parent company under the multiple ownership rules, 47 C.F.R. Section 73.3555 (1985), and (2) has actual involvement in the day-to-day operations of the broadcast subsidiary. *See* 102 FCC 2d at 1219-20. CBS requests that we apply this same standard to individual acts of non-FCC misconduct by the officers and employees of the nonbroadcast divisions of a corporate applicant. However, for the same reasons cited above, we will deny this request. Nevertheless, corporate applicants will not be precluded from making a special showing, as described *supra*, that a division of a corporate applicant should be treated like a subsidiary for purposes of attributing individual acts of misconduct.

[29] We note, moreover, that whereas the presumption governing the relevance of misconduct in another subsidiary will differ from that in a different division, the final determination in either case will turn on the same facts: the involvement of common management principals.

[30] 47 C.F.R. Section 73.658 (1985).

[31] *See Policy Statement*, 102 FCC 2d at 1223-25.

[32] A cable network distributes "satellite cable programming." Pursuant to the Cable Communications Policy Act of 1984, Pub. L. No. 98-549 (codified at 47 U.S.C. Section 605(c)(1)(Supp. II 1984), "the term 'satellite cable programming' means video programming which is transmitted via satellite and which is primarily intended for the direct receipt by cable operators for their retransmission to cable subscribers."

[33] *But see National Association of Broadcasters v. FCC,* 740 F.2d 1190, 1204-05 (D.C. Cir. 1984)(suggesting that customer-programmers who lease or otherwise have access to common carrier facilities may be subject to broadcast regulation under Section 301 of the Communications Act). This matter is currently being considered in the *Notice of Proposed Rule Making,* in Gen. Docket No. 85-305, 51 F.R. 1817, paras. 39-43 (released January 15, 1986)(Subscription Video Services). *See also Notice of Inquiry* in Gen. Docket No. 86-336, Mimeo No. 36804, at para. 93 (released August 19, 1986) (Inquiry into Scrambling of Satellite Television Signals).

[34] *Baker Protective Services Inc.,* 59 RR 2d 1141 (1986).

[35] 87 FCC 2d 836 (1981).

[36] *See, e.g., Arizona Mobile Telephone Co.,* 93 FCC 2d 1147, 1155 (1983), which states, "[T]he fundamental differences between broadcast and DPLMRS proceedings require different standards, and misconduct which could reflect adversely on the character qualifications of broadcast applicants would not have the same impact on the qualifications of a DPLMRS applicant."

[37] *See Puerto Rico telephone Company,* Mimeo No. 2689, released February 21, 1986.

[38] 42 FCC 2d 399 (1951).

[39] *Baker,* 59 RR 2d at 1142 n.1.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 85-166

Investigation of Special Access Phase I
Tariffs of Local Exchange Carriers

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

Adopted: October 23, 1986; Released: November 5, 1986

By the Commission: Commissioner Dennis not participating.

I. INTRODUCTION

1. On January 24, 1986, we released a Memorandum Opinion and Order completing Phase I of our investigation of special access rates and rate structure in Docket 85-166.[1] In the *Phase I Order*, we resolved issues relating to certain aspects of the special access rate structure as well as questions regarding cost allocations to various special access rate elements. We also prescribed a 1.6 to 1 ratio between 4-wire and 2-wire channel termination rates and directed carriers to adjust their rates accordingly.

2. Petitions for Reconsideration of the *Phase I Order* have been filed by the Television User Parties (User Parties),[2] Western Union Telegraph Company (Western Union), and the International Telephone and Telegraph Company (ITT). The User Parties seek reconsideration of that part of the *Phase I Order* which disallowed 50 percent of the local exchange carriers' (LEC's) investment in unused polyethylene shielded video (PSV) cable. Western Union seeks reconsideration of the allocation of voice-grade performance and facility interface costs to channel termination rates as well as the allocation of central office and other related costs to metallic services which it alleges do not use such facilities. It also argues that the LECs have improperly failed to reduce their metallic channel termination rates in light of our prescription of a 1.6 to 1 ratio of 4-wire to 2-wire channel termination rates. Finally, ITT seeks reconsideration of our decision to prescribe a single ratio for 4-wire to 2-wire channel termination rates which applies nationwide.[3]

3. We have reviewed the petitions and responsive pleadings and will affirm our previous decisions on the issues they raise.[4] As discussed below, the petitioners have failed to convince us that the findings and conclusions reached in the *Phase I Order* were in error or should be modified. Accordingly, the subject petitions for reconsideration will be denied.

II. SUMMARY OF PLEADINGS AND DISCUSSION

A. The User Parties Conditional Petition for Reconsideration

4. In the *Phase I Order*, we determined that the video service rate base of the various local exchange carriers includes $53.5 million of PSV cable investment that is either not currently used or has never been used to provide television service. Under traditional public utility rate regulation, property that is not "used and useful" would be excluded from the rate base of the regulated entity. We found, however, that video service customers have benefitted from the American Telephone and Telegraph Company's initial decision to include PSV cable in composite sheaths, that a certain amount of excess cable is actually serving as a reserve, and that these "equitable considerations" warranted allowing 50 percent of the unused PSV cable investment to remain in the video service rate base while disallowing the remaining 50 percent.

5. The User Parties argue that the Commission erred in not disallowing the entire $53.5 million in unused PSV cable investment. They assert that it is unreasonable to require video service customers to pay for PSV cable that is not being used, that in some cases has never been used for video services, and that will not be so used in the future. They also argue that the record contains no evidence that the LECs require 50 percent of unused PSV cable as a reserve, that the "split-the-difference" compromise rewards the LECs for failing to comply with this Commission's directive to provide a PSV inventory,[5] and that the one-half disallowance provides insufficient incentive for the LECs to develop alternative cable uses. Accordingly, they ask us to disallow immediately the entire unused investment.[6] Notwithstanding these arguments, however, the User Parties offer to withdraw their petition[7] if no LEC files petition for reconsideration on the PSV cable issue or seeks judicial review of this aspect of the *Phase I Order*.[8]

6. In their Oppositions and Comments, Ameritech, NYNEX and Pacific Bell disagree with the User Parties' characterization of the 50 percent disallowance as "permanent," citing this Commission's statement that the disallowance would be adjusted if subsequent studies or alternative uses for PSV demonstrate that an adjustment is warranted.[9] Bell Atlantic states that this Commission never intended to disallow the entire PSV investment and that, as a result of the disallowance decision, rates for television service have decreased by as much as 55 percent in its region.

7. We affirm our decision to disallow 50 percent of the unused PSV cable investment from the LECs' rate bases and will deny the User Parties' conditional petition. The petitioners have presented neither new facts that support disallowance of the entire unused PSV investment nor new arguments that undercut the reasonableness of our 50 percent disallowance rationale. Our decision to disallow 50 percent of the PSV investment represents a balancing of the interests of carriers and ratepayers, taking into account equitable considerations, and the User Parties have not convinced us that a greater disallowance is warranted.[10] In addition, in our view, the terms of the petitioners' offer to withdraw their petition undercuts the force of their arguments for full disallowance. The User Parties expressly recognize that our disallowance decision is intended to end a long-standing controversy, and offer to withdraw the petition in the event the PSV disallowance issue is not appealed.[11] In other words, the User Parties appear to concede that our decision has effected a reasonable balance between competing interests and points of view and should not be disturbed.

8. We note also that the 50 percent disallowance standard may not be "permanent." In the *Phase I Order*, we specifically stated that this percentage would be adjusted in the event the LECs subsequently justify the inclusion in their rate bases of disallowed PSV investment either by

quantifying the property more specifically or by demonstrating that the PSV cable pairs in question have been put to alternative use.[12]

II. Western Union Petition for Reconsideration

9. Western Union seeks partial reconsideration of the *Phase I Order* on the following issues: (1) the allocation of voice-grade performance equipment (VGP) costs to channel termination (CT) rates and not to channel mileage rates; (2) the allocation of facility interface (FACIF) costs to CT rates rather than channel mileage; (3) the allocation of central office circuit equipment costs, Account 231 (station apparatus) and Account 234 (large PBXs) to metallic facilities; and (4) modification of the LECs' metallic CT rates on the grounds that the Commission-prescribed 1.6 to 1 ratio of 4-wire and 2-wire voice-grade channel termination rates necessarily implies that 2-wire metallic rates are similarly overpriced.

10. First, Western Union argues that our determination that voice-grade performance equipment and FACIFs are associated with local loops, rather than trunks, is legally insufficient in that it is based on conclusory and unsupported statements. It further asserts that the basic CT rates already reflect the full costs of all loop-related equipment, such as pads, equalizers and amplifiers necessary for voice-grade performance, and that the costs allocated to the VGP rate element relate entirely to exchange and interexchange trunk circuit equipment. It also re-argues its previous contention that the allocation of these costs to the "Other Special" category under Part 69 of the Commission's Rules indicates that they are trunk, not loop, related and properly allocable to channel mileage.[13]

11. Second, Western Union argues that metallic facilities do not employ Account 231 station equipment or Account 234 large PBXs and that metallic channel termination rates are excessive to the extent they cover the cost of central office equipment (COE) which is not used for terminating such facilities. Western Union asserts that the *Phase I Order* did not address these issues (even though Western Union raised them in its earlier filings) and argues again that these costs should not be included in the rates for metallic facilities.

12. Finally, Western Union argues that our 1.6 to 1 prescription resulted in carriers reducing their 2-wire telegraph and voice grade rates and increasing their 4-wire rates while leaving 2-wire metallic rates unchanged. This, it asserts, has reduced the differential between metallic and 2-wire voice grade rates so that the rate structure fails to reflect cost differences between these facilities. It asks that carriers be required to adjust their metallic, telegraph and voice grade rates to preserve the rate relationships that existed between metallic and 2-wire voice grade rates under the October 1985 tariffs.

13. Eight parties filed oppositions to Western Union's petition.[14] A few state that the petition fails to satisfy our standards for reconsideration and should be summarily dismissed.[15] As to the merits, the commenters unanimously assert that Western Union has made these same arguments throughout this and previous proceedings relating to special access tariffs[16] and has merely "reintroduced them here under a different pretext or with a subtle variation in reasoning."[17] Several of the commenters assert that Western Union's contentions relating to the allocation of VGP or FACIF costs confuse separations classifications of circuit equipment with the special access rate structure and misinterpret the purpose of the "Other Special" ratemaking category which, they assert, is both channel termination and channel mileage related. For example, Ameritech and NYNEX state that the Other Special category includes VGP, FACIFs and other equipment which, under separations treatment, are trunk circuit equipment, but which are correctly included in the channel termination rate element because they are used by all customers in the provision of voice-grade service between customer premises and the serving wire center; *i.e.*, they are required to provide continuity on the local loop. Thus, the commenters conclude, the allocation of these costs to channel terminations is both reasonable and correct.

14. The opposition commenters state that Account 231 station equipment and Account 234 large PBXs,[18] are used to meet basic channel transmission and signaling parameters and are associated with test equipment used for metallic services. Therefore, some allocation to metallic services is appropriate.[19] Moreover, they assert that Western Union's arguments are merely another attempt to implement equipment-specific pricing previously advanced by Western Union and rejected by this Commission in Docket 83-1145 and in the *Phase I Order*.[20] Finally, on the readjustment of metallic rates issue, the commenters take various opposing positions arguing, for example, that metallic costs are not influenced by the 2-wire to 4-wire prescription since metallic service is 2-wire only; that the Phase I investigation was limited to channel termination rates for the voice and sub-voice grade categories and that this includes only voice grade and telegraph grade service, and not metallic; that the prescription required a redistribution of costs within the voice-grade category and should not affect the costs of metallic services; and that we have no obligation to preserve a previous rate differential between special access services.[21]

15. Upon review, we conclude that Western Union's petition is largely a re-argument of issues that have been fully developed and resolved in this and previous proceedings and need not be reexamined in any detail. As to the allocation of VGP and FACIF costs to the channel termination rate element, Western Union has not demonstrated that our conclusion that this equipment is used to establish the basic transmission path on local loops is in error. Therefore, the allocation of such costs to the channel termination rate element is not unreasonable. Our *Phase I Order* examined Western Union's assertion that central office equipment and Account 231 and Account 234 equipment are not used in providing its metallic service. We specifically rejected its user-specific ratemaking argument, concluding that this equipment is used to establish the path between customers and their serving wire center and is properly allocable to the channel termination rate element for metallic service.[22]

16. Western Union's final argument concerns adjustment of the rate for 2-wire metallic service in light of our prescription of a 1.6 to 1 ratio of 4-wire to 2-wire channel termination rates for telegraph and voice grade services. Western Union's argument is not persuasive. In establishing the prescription, we were concerned with the question of the proper allocation of costs between the 4-wire and 2-wire configurations of certain services. Since metallic service is a 2-wire service only, the prescription does not require a readjustment of these rates. Moreover, Western Union has not shown why the differential between metallic rates and 2-wire voice grade rates that existed under

the October 1985 tariffs must be maintained. Accordingly, we will not require the LECs to adjust their 2-wire metallic rates in this regard.

C. ITT Communication Services Petition for Reconsideration

17. In its petition, ITT asks that we vacate our prescription of a uniform nationwide ratio for 2- and 4-wire channel termination rates, and permit the continued use of exchange carrier-developed rates based on each carrier's actual costs. ITT argues that the prescription is arbitrary and unsupportable in that it ignores obvious cost differences among exchange carriers, that it improperly requires users of 4-wire service to subsidize 2-wire service, and that the record does not support the conclusion that the exchange carrier-developed ratios unreasonably favored 4-wire facilities.[23]

18. One commenter supports the ITT petition, stating that there is no evidence to support the 1.6 to 1 prescription.[24] Western Union and SATNET filed oppositions asserting that the exchange carrier-developed rates unaccountably allocated more costs to 2-wire service, that in the absence of reliable individual carrier data a Commission prescription is warranted, and that the prescription reflects actual ratios in the LECs' October 1985 filings.

19. We conclude that the ITT petition does not make a case for revocation of the prescription. The essence of ITT's position is that the differing demand forecasts and cost allocations used by the various LECs reflect cost differences among the carriers. In the *Phase I Order*, however, we considered this argument and found that the LECs had not provided sufficient justification for the wide range of ratios among carriers nationally as well as between carriers in the same regional holding company who were providing service in the same state.[25] The carrier-developed cost allocations also provided insufficient justification for their substantial deviation from the 2 to 1 cost ratio that should be the starting point in assessing the reasonableness of these rate relationships. Moreover, our prescription reflected cost relationships from the most recent special access tariff filings, which were based on actual operating results. We continue to believe, in the absence of more reliable data from the LECs supporting alternative ratios, that our prescription of a nationwide ratio between 2-wire and 4-wire channel termination rates should be retained.

20. We recognize, however, that while it is beneficial to have a uniform, industry-wide ratio for the relationship between 2-wire and 4-wire termination rates, carriers may be able to demonstrate, based on their own costs, that a different ratio should be applied. Accordingly, in the *Phase I Order*, we indicated our willingness to consider requests for waiver of the uniform prescription if a carrier can demonstrate that a different ratio should apply.[26] One carrier has already obtained a waiver of the prescription.[27] This result is consistent with ITT's argument that properly supported carrier-developed rates are superior to Commission-prescribed uniform nationwide rate ratios. Accordingly, we emphasize our willingness to consider requests for waiver of our 1.6 to 1 prescription that are supported with a showing by individual carriers that, based on their own costs, a different ratio should be applied.

III. ORDERING CLAUSES

21. Accordingly, IT IS ORDERED that the petitions for reconsideration filed by the Television User Parties, Western Union Telegraph Company and the International Telephone and Telegraph Company regarding the *Phase I Order* ARE DENIED.

22. IT IS FURTHER ORDERED that the petition for reconsideration filed by the International Telephone and Telegraph Company against the Common Carrier Bureau's Order in CC Docket No. 85-166, Mimeo No. 2757, released February 21, 1986 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

FOOTNOTES

[1] Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase I, FCC 86-52, released Jan. 24, 1986 (*Phase I Order*). The Order designating issues for investigation in this proceeding was released by the Common Carrier Bureau on May 24, 1985. Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase I, Mimeo No. 4726.

[2] The User Parties consist of the American Broadcasting Companies; the Association of Independent Television Stations; CBS; the Hughes Television Network; the National Association of Broadcasters; the National Broadcasting Company; and the Public Broadcasting Service.

[3] In light of the similarity of the issues, we also take this opportunity to deny ITT's petition for reconsideration of a Bureau Order granting Southwestern Bell Telephone Company a waiver of the 1.6 to 1 prescription. See n. 27, *infra*.

[4] Oppositions or comments were filed by the Ameritech Operating Companies (Ameritech); the Bell Atlantic Companies (Bell Atlantic); BellSouth Corporation (BellSouth); Cincinnati Bell Telephone Company (Cincinnati Bell); Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company and Pacific Northwest Bell Telephone Company (US West); the National Exchange Carrier Association, Inc., (NECA); the NYNEX Telephone Companies (NYNEX); Pacific Bell Telephone Company (Pacific Bell); Satellite Data Broadcast Networks, Inc. (SATNET); Southwestern Bell Telephone Company (Southwestern Bell); and Western Union Telegraph Company (Western Union).

[5] *Phase I Order* at n.57. The User Parties claim that the video service rate base probably includes more than $53.5 million in unused PSV investment.

[6] Alternatively, the User Parties ask the Commission to disallow immediately the LECs' claimed annual expenses of $6.7 million for the remaining 50 percent of unused PSV, to phase out that remaining 50 percent allowance by a date certain, for example, within five years, and to discourage the LECs from adding new unused PSV investment to the video service rate base.

[7] The User Parties assert, however, that they would reserve the right to challenge the reasonableness of any future LEC tariff which includes new PSV cable investment without demonstrating that the new facilities actually provide television program service.

[8] Judicial review of the *Phase I Order* has, however, been sought by Western Union and by MCI, but not regarding the PSV issue.

[9] *Phase I Order* at n.68.

[10] This approach is consistent with our practice of taking into account equitable considerations in the "used and useful" decision-making process. *See Phase I Order* at para. 41. *See also* Comsat, 56 FCC 2d 1101, 1121-22 (1975).

[11] User Parties' Petition at 4-5. In our view, the conditions established by the User Parties for withdrawing their petition have been met. No LEC has filed a petition for reconsideration with this Commission regarding the PSV cable issue or sought judicial review of the *Phase I Order*. The appeals taken by MCI and Western Union of the *Phase I Order* do not raise the PSV issue. Under these circumstances, the User Parties' failure to withdraw their petition has imposed an unwarranted burden on our resources.

[12] *Phase I Order* at n.68. We note that a number of the LECs state that they are conducting studies to better identify both total and unused PSV cable in their inventories and will seek adjustments of the disallowance as appropriate.

[13] We found, in the *Phase I Order*, that the apportionment of these costs to the "Other Special" category was irrelevant to the question of whether such investment relates exclusively to trunk costs. *Phase I Order*, at para. 86. This finding was in response to Western Union's earlier argument that all VGP and FACIF costs are assigned to the "Other Special" category and that all "Other Special" costs are trunk-related. In the *Phase I Order* we found that Part 69 makes no distinction between trunk and loop costs and thus is not controlling on the cost allocation question here.

[14] Parties opposing Western Union's petition are NECA, Ameritech, BellSouth, NYNEX, Southwestern Bell, Bell Atlantic, US West, Cincinnati Bell and Pacific Bell.

[15] For example, NYNEX asserts that Western Union's petition is comparable in character to the type of overly repetitious petitions which may be summarily dismissed by the staff under Section 1.106(b)(3) of the Rules. Section 1.106(b)(3) is concerned with petitions for reconsideration of an Order denying an application for review, however, and is not applicable here. To the extent the commenters suggest that Western Union's petition is so repetitive as to warrant summary dismissal, we believe the public interest is better served in this instance by a full airing of the issues raised and consideration of the petition on its merits.

[16] *See* Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Phase I and Phase II, Part 1, FCC 85-70, released Feb. 19, 1985 (*February 19 Order*); FCC 85-100, released Mar. 8, 1985 (*March 8Order*).

[17] Opposition of Pacific Bell at 2-3. For example, Pacific Bell points out that in the Designation Order in this proceeding, the Commission asked the LECs to address Western Union's arguments regarding the allocation of VGP and FACIF costs to channel termination or channel mileage as well as the question of allocating station apparatus and PBX costs. It states that the issues have been fully pleaded and disposed of by the Commission and that the petitioner presents no new material requiring reconsideration. *See* Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Mimeo No. 4726, released May 24, 1985 (*Designation Order*).

[18] The commenters state that Account 234 contains many types of equipment, including terminating sets, multiplexers, repeaters, *etc.*, in addition to the phase down investment of PBXs, which are generic in nature and an integral part of the basic service provisioning process.

[19] The LECs contend that some COE (local coils and test desk equipment) is used to maintain transmission parameters for all special access services and that at least some Account 231 and Account 234 equipment is also an integral part of the basic service provisioning process.

[20] *See Phase I Order* at para. 70.

[21] In contrast to Western Union's arguments, NECA states that its June 1986 effective metallic channel termination rate would have to be slightly increased to preserve the "absolute differential" cited by Western Union.

[22] *Phase I Order* at para. 70.

[23] ITT also states that the significant increase in the rate for 4-wire channel terminations will materially diminish its ability to compete in various markets.

[24] Comments of US West. In addition, Bell Atlantic voices agreement with ITT that these rates should reflect cost differences among the LECs, but opposes granting ITT's petition on grounds of excessive disruption to consumers.

[25] *Phase I Order* at para. 103.

[26] *Phase I Order* at n.52.

[27] Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase I, Mimeo No. 2757, released Feb. 21, 1986. In that Order, the Bureau granted Southwestern Bell Telephone Company a waiver of the 1.6 to 1 rate ratio prescription because the carrier's existing company-wide average rate ratio (1.66 to 1) was so close to the prescribed ratio and because many users of Southwestern Bell's 2-wire services would have experienced undue hardship, *i. e.*, increased 2-wire rates, if the carrier were required to implement the prescription. In light of our conclusion that the then-existing rates unduly prejudiced users of 2-wire services, the Bureau granted a waiver of the prescription. ITT filed a Petition for Reconsideration of the waiver arguing that the Bureau should not compound the "hardship" resulting from the prescription (increased 4-wire rates) by allowing Southwestern Bell to maintain its higher-than-prescribed 4-wire rates. (ITT apparently assumes that Southwestern Bell would have to decrease 4-wire rates in some states to attain the prescribed ratio.) In light of our willingness to look favorably upon adequately supported individual carrier waivers of the prescription, we deny ITT's petition.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MTS and WATS Market Structure — CC Docket No. 78-72

Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board — CC Docket No. 80-286

MEMORANDUM OPINION AND ORDER

Adopted: October 23, 1986 **Released: November 5, 1986**

By the Commission: Commissioner Dennis not participating.

1. The Office of Consumer's Counsel, State of Ohio (OCCO), has filed a petition for reconsideration of our recent *Decision and Order*[1] *adopting the recommendations of a Federal-State Joint Board (Joint Board) for a federal lifeline assistance program. For the reasons discussed in the following paragraphs, we deny OCCO's petition for reconsideration.*

I. Background

2. On December 10, 1985, the Joint Board adopted a *Recommended Decision and Order*[2] which recommended that this Commission implement an expanded federal lifeline assistance program to assist low income households in purchasing telephone service. The new approach recommended by the Joint Board would provide matching federal assistance, through a waiver of the subscriber line charge established in our access charge rules,[3] to subscribers receiving benefits under a qualifying lifeline assistance plan. The *Recommended Decision* specifically provided that the state commissions or local exchange carriers be permitted to apply for this federal lifeline assistance. The Joint Board also recommended that this Commission establish a certification procedure to be administered by the Common Carrier Bureau (Bureau) to assure that the proposed assistance programs satisfy general requirements that customer eligibility for such programs be means-tested and subject to verification.

3. We adopted the Joint Board's recommendations and the reasoning contained therein in our *Lifeline Order*. In that order, we found that the implementation of the proposed federal assistance program to supplement the benefits provided under state approved local lifeline service offerings will help further our universal service goal. We also found that it will provide the states and local telephone companies with a strong incentive to implement local lifeline assistance programs that respond appropriately to local conditions, and will promote telephone subscribership among low income groups.[4]

II. Petition for Reconsideration and Opposition

4. On February 11, 1986, the OCCO filed its Petition for Reconsideration of the *Lifeline Order*. In its petition, OCCO requests that, in addition to having state commissions and telephone companies file for certification of a localized assistance plan, we allow consumers and their "direct representatives" to apply directly to this Commission for the state-wide or service territory-wide federal lifeline assistance made available in the *Lifeline Order*. OCCO argues that the effect of permitting only state commissions and telephone companies to apply for matching assistance may be to block consumer access to the federal benefits. The petitioner contends that the addition of consumers and their "direct representatives" to the group eligible to file for certification is necessary, because regulated telephone companies are reluctant to implement lifeline assistance and even oppose such programs outright. To support its contentions, OCCO claims that two telephone companies in Ohio, Ohio Bell Telephone Company (Ohio Bell) and United Telephone Company of Ohio (United Telephone), have not sought federal lifeline benefits to match state-ordered reductions in certain service initiation charges and in other instances have opposed OCCO's intervention and recommendation in support of federal lifeline benefits. Thus, OCCO concludes that this Commission should modify its lifeline plan to make federal lifeline assistance available upon application by consumers and their direct representatives as well as telephone companies and states in order to ensure that the telephone subscribers receive the full benefits of the federal lifeline assistance program.

5. On March 28, 1986, Ohio Bell filed an opposition to OCCO's petition for reconsideration.[5] In its opposition, Ohio Bell argues that OCCO's position is without merit and should be denied. In response to OCCO's charge that parties in Ohio have failed to bring a viable lifeline plan before this Commission, Ohio Bell states that the PUCO has not adopted a lifeline program, so neither the PUCO nor Ohio Bell is in a position to seek benefits under the federal lifeline plan. Specifically, Ohio Bell contends that the PUCO at no time ordered Ohio Bell to reduce its service initiation charges, but ordered Ohio Bell only to prepare a proposal which provided a deposit waiver or reduction of service connection charges, a task which Ohio Bell completed.[6]

III. Discussion

6. The preservation of universal telephone service has been one of our longstanding goals in the *MTS/WATS Market Structure* proceeding. Our federal lifeline program was developed to promote the telephone subscribership levels of low income households, which have remained below the national average, by assisting those households in purchasing telephone service. Since matching federal benefits are provided only to subscribers in states that have certified lifeline programs, qualifying subscribers are assured of receiving benefits on both their local service costs and the federal subscriber line charge. The federal program permits state commissions or local exchange carriers to provide the required matching assistance through subsidies for local exchange service, service connections, or customer deposits. This added flexibility allows state commissions and telephone companies to develop lifeline programs tailored to their particular communities' needs.

7. In its petition, OCCO states that consumers and their direct representatives must be able to apply for federal benefits because the local telephone companies generally do not support lifeline assistance and, thus, would take a "relaxed" approach in applying for these benefits or would persuade the state commissions not to apply for the lifeline benefits. We believe that the lifeline program, as presently established, properly delegates the responsibilities of applying for federal benefits to those parties that are responsible for developing and implementing an assistance program, have the most knowledge about that program, and have substantial incentives for maintaining and promoting the telephone subscribership rates in the state. Since state commissions and local telephone companies are responsible within their states for ensuring that citizens receive telephone service, only a state commission or a local telephone company can adopt or implement a lifeline program that provides assistance on local telephone rates to telephone subscribers. In addition, before such a plan can be certified by this Commission final state "approval" is necessary (either through legislation, state commission rule, or approval of the local exchange carriers' tariffs). Thus, the state commission and local exchange carriers are the proper applicants for formal certification once the state approval process is completed. Allowing consumers or consumer groups to apply for certification as well, would unduly complicate the certification process and create unnecessary administrative burdens, with no apparent benefit to the public.[7]

8. Moreover, we have no reason to believe that state commissions and local telephone companies do not support lifeline assistance measures. State commissions and local telephone companies have every incentive to seek matching federal benefits, since once a plan is certified and implemented the cost of the federal benefits are not borne by the state ratepayers but are recovered through the interstate carrier common line charge paid by interexchange carriers. In fact, since the adoption of the federal lifeline program, several state commissions and local telephone companies have already implemented lifeline plans that have been certified as meeting the federal requirements.[8]

9. OCCO supports its general contention that local exchange carriers are opposed to lifeline assistance by arguing that two telephone companies in Ohio failed to apply for federal benefits to match the state-ordered reduction in service initiation costs. We are not persuaded by OCCO's arguments. As Ohio Bell states in its opposition, it was never ordered to reduce its service initiation charges but was directed only to submit a proposal meeting the objectives of the United Telephone assistance plan. This fact is also evident in OCCO's attachments to its petition for reconsideration.[9] Also evident in the attachments to OCCO's petition is that the PUCO is committed to establishing a state lifeline plan but is in the midst of studying the matter on a generic industry-wide basis.[10] Thus, contrary to OCCO's contention, it would have been premature for Ohio Bell to apply for federal benefits. In addition, OCCO neither claims nor states that the state-ordered rate reductions were designed by the PUCO to meet the federal requirements for federal matching benefits. Therefore, it does not appear that the revelant parties in Ohio were in a position to apply for federal matching lifeline benefits as OCCO urges.

10. This Commmission is strongly supportive of efforts in Ohio and elsewhere to develop state lifeline plans which can be doubly effective when combined with the federal assistance available through our lifeline assistance measures. We also recognize that consumers and consumer representatives can play an important role in assisting state commissions and telephone companies in developing well-targeted lifeline plans on a timely basis. However, for the reasons discussed above, we find that allowing formal applications for FCC certification by consumers or consumer groups is unwarranted. Consequently, we find that OCCO's request should be denied.

IV. Ordering Clauses

11. Accordingly, IT IS ORDERED, that the petition for reconsideration of the Office of Consumers' Counsel, State of Ohio, IS DENIED.[11]

12. IT IS FURTHER ORDERED that the motion of the Office of Consumers' Counsel, State of Ohio, to strike Ohio Bell Telephone Company's opposition to the petition for reconsideration IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

FOOTNOTES

[1] Decision and Order, MTS/WATS Market Structure and Amendment of Part 67 of the Commission's Rules, CC Docket Nos. 78-72 and 80-286, 51 Fed. Reg. 1371 (1986) (hereinafter *Lifeline Order*).

[2] MTS/WATS Market Structure and Amendment of Part 67 of the Commission's Rules, CC Docket Nos. 78-72 and 80-286, FCC No. 85-639 (released December 9, 1985) (hereinafter *Recommended Decision*).

[3] 47 CFR § 69.104(a) (1985).

[4] In addition, we supported the Joint Board's recommendation for review of the lifeline program in conjunction with the Joint Board's reexamination of subscriber line charges. We recently initiated a further examination of subscriber line charges in a Further Notice of proposed Rulemaking, which requests comments from interested parties and recommendations from the Joint Board on specific modifications of the current subscriber line charges, the lifeline program and the high cost assistance measures as well as some other related issues. Further Notice of Proposed Rulemaking, MTS/WATS Market Structure and Amendment of Part 67 of the Commission's Rules, CC Docket Nos. 78-72 and 80-286, FCC 86-305 (released July 2, 1986).

[5] We note that although Ohio Bell filed its opposition late, we will accept the opposition and waive the filing deadline since it ws filed only two days after the official deadline. In addition, July 14, 1986, the OCCO filed a letter with this Commission which requested that we strike from the record Ohio Bell's opposition to OCCO's petition for reconsideration. OCCO argues that Ohio Bell failed to serve OCCO as required by our Rules and thus has deprived OCCO of an opportunity to reply to the opposition. *See* 47 C.F.R. §§ 1.429(f) & (g). We deny OCCO's request, because we find that OCCO has not been prejudiced by the lack of service. Although OCCO was not served with the opposition, it did become aware of the filing and could have filed late-filed comments.

[6] Information in OCCO's attachments reveal that on December 10, 1985, the PUCO approved a "telephone assistance plan" filed by United Telephone. However, the PUCO authorized the

offering only for an experimental period of one year, and stated that the state commission not United Telephone would determine the future of the experimental offering. On the same date as it authorized United Telephone's tariff revisions, the PUCO in a separate proceeding directed Ohio Bell to file a proposal for Ohio Bell's tariffs designed to accomplish the same objectives as the plan filed by United Telephone. Ohio Bell states that on December 30, 1985, it filed the required proposal. The PUCO however has granted a rehearing on the matter.

[7] We note, however, that the Bureau staff has conducted and will continue to conduct informal discussions with consumer representatives and others who have sought informal guidance on whether or not a particular plan under consideration at the state level would satisfy the federal criteria for matching assistance if it were to be approved by the state and filed.

[8] The lifeline plans of the District of Columbia, Arkansas, Colorado, Maryland, North Carolina, Oregon, West Virginia and Vermont have been certified as meeting the requirements for matching federal assistance. *See* FCC News Release, Report No. CC-129, July 29, 1986; and FCC News Release, Report No. CC-123, May 23, 1986, and FCC News Release, Report No. CC-148, October 1, 1986. California and New York also presently receive federal assistance under plans which went into effect under this Commission's more limited original lifeline assistance measures.

[9] *See* Petition for Reconsideration, Attachment VI para. 8.

[10] Information filed by OCCO indicates that the PUCO has granted rehearing on both the revenue impact of implementing the Ohio Bell proposal and OCCO's contention that the state commission should order Ohio Bell to (1) conform the telephone asssistance plan to this Commission's lifeline requirements and (2) apply to this Commission for the matching federal lifeline assistance. OCCO's filing also reveals that, in a separate proceeding, the PUCO also granted rehearing on whether to require United Telephone to conform its telephone assistance plan to the federal lifeline requirements and whether to direct United Telephone to file with this Commission for certification of its plan. Although the PUCO granted the rehearing requests, the PUCO denied OCCO's contention that the PUCO erred in not ordering a more extensive assistance plan for the needy. The PUCO found that it currently has a pending proceeding on the lifeline issue in which it will consider the lifeline issue on a generic and industry-wide basis and that considering the matter on a company-by-company basis could prejudice the ultimate determination in the generic proceeding. *See* Petition for Reconsideration, Attachments I-IV.

[11] This action is taken pursuant to Sections 1, 4(i) and (j), 5, 201, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i) & (j), 155, 201, and 403 (1984).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Petitions for Recovery of
Equal Access and Network
Reconfiguration Costs

MEMORANDUM OPINION AND ORDER

Adopted: October 23, 1986 Released: November 5, 1986

By the Commission: Commissioner Dennis not participating.

I. Introduction

1. Four of the regional Bell holding companies have filed petitions for reconsideration of our order[1] prescribing accounting methods for equal access and network reconfiguration costs.[2] In addition BellSouth has requested a stay of the effective date of that Order. We have decided to grant requests to substitute a fixed eight year amortization period for a rolling period and to permit carriers to charge the deferred expenses to Account 675. We have decided to deny all other requests to modify the *Equal Access Accounting Order*.

2. The court that adopted the Modification of Final Judgment (MFJ)[3] that resulted in the Bell System divestiture also adopted an order requiring the American Telephone and Telegraph Company (AT&T) to guarantee the recovery of certain equal access and network reconfiguration costs by the former Bell Operating Companies ("BOCs").[4] Bell Communications Research requested this Commission's concurrence in an accounting plan to implement that guarantee, but the Chief of the Common Carrier Bureau concluded that the accounting plan could not be approved without modification. That decision prompted the filing of various petitions by regional Bell holding companies requesting approval of accounting plans, waivers of depreciation prescriptions, amendment of the access charge rules to create separate elements for equal access and network reconfiguration costs, and approval of the use of a "true-up" mechanism in ratemaking. The *Equal Access Accounting Order* was issued in response to those petitions.

3. We concluded that network reconfiguration and equal access costs should not be treated as a single category for accounting or other purposes and declined to adopt any special treatment for network reconfiguration costs for accounting, depreciation or tariff purposes. The *Equal Access Accounting Order*, defined equal access costs for accounting purposes and provided guidelines for the accounting treatment of investment and expenses within that category including a requirement that certain equal access expenses be recorded in a deferred account and amortized over a period of eight years. We denied requests to change the prescribed depreciation rates for investment that is included in the equal access category, granted a waiver of the Part 69 rules to permit carriers to establish a separate equal access element, and declined to consider the "true-up" proposal at that time.

II. The Reconsideration Petitions

4. Generally, the petitioners requested that this Commission (1) reconsider our definition of equal access costs; (2) eliminate the rolling eight year amortization period for equal access expenses; (3) shorten the depreciable lives of capitalized equal access assets to coincide with the AT&T guarantee period; and, (4) eliminate a requirement that deferred equal access expenses be amortized to the account that would have been originally charged if the expenses had not been deferred.

5. BellSouth and NYNEX both request that we reconsider our definition of equal access costs. These petitioners contend that the definition of the equal access costs should not be limited to the costs of connecting offices that serve competitive interexchange carriers or that have been incurred as the result of bona fide requests for conversion to equal access, but should include the costs of converting all end offices. BellSouth states that the definition in the *Equal Access Accounting Order* is underinclusive of the costs that are truly equal access costs under the MFJ and that the use of an inconsistent definition makes it more difficult to track the costs of equal access. BellSouth also contends that our definition penalizes carriers for implementing equal access on an expeditious basis because costs incurred without a bona fide request for conversion are excluded. NYNEX asserts that our definition could impede the MFJ's purpose of implementing equal access as quickly as possible in all end offices where it is practicable. NYNEX states that it has not received any bona fide requests for conversion but since the lead time needed to convert to equal access is 18 months, it has established a schedule for conversion based on projections of the demand for equal access. NYNEX also states that in every location where equal access has been offered, competitive interexchange carriers have subscribed to Feature Group D service.

6. BellSouth, NYNEX and US West seek reconsideration of the requirement that equal access expenses be amortized over a rolling eight year period.[5] These petitioners contend that this requirement is an exception to the general rule of ratemaking whereby expenses are recovered in the year in which they are incurred. While US West suggests requiring no amortization of equal access expenses, BellSouth and NYNEX both offer as an alternative a single amortization period of eight years in which to recover equal access expenses that would be timed to end with the close of the MFJ guarantee on December 31, 1993. All three petitioners state that their alternatives should be substituted for the amortization period we selected because after the first two years equal access expenses are expected to be relatively low. In addition, NYNEX states that the use of a rolling eight year period will invalidate the MFJ guarantee since costs incurred in the later years would not be fully amortized by January 1, 1994. Another argument for abandoning the rolling eight year amortization period, BellSouth states, is the fact that a single eight year period will accommodate the exchange carrier concerns with cost guarantee requirements under the MFJ, as well as this Commission's concern with minimizing costs to ratepayers. Finally, US West states that if equal access expenses must be deferred and amortized, then the full amount of such deferred expenses should be subject to recovery in future rates regardless of when the equal access cost recovery rates become effective.

7. Bell Atlantic, BellSouth and US West seek reconsideration of the requirement that equal access expenses must be amortized to the same accounts that would have been charged had equal access expenses not been deferred. These petitioners state that this requirement is costly and burdensome and there is no regulatory need to do so. Bell Atlantic and BellSouth suggest that these costs be amortized to a single account namely Account 675. BellSouth believes that this alternative will create no matching, separations or other problems and it would be much less costly to implement than the accounting procedure we adopted.

8. NYNEX also seeks reconsideration of our decision rejecting proposals to prescribe shorter useful lives for equal access assets. NYNEX urges this Commission to shorten the depreciable lives of capitalized equal access assets to coincide with the MFJ guarantee period and, in addition to allow carriers to true-up the deferred equal access expenses on an annual basis to reflect any under or over recovery of expenses in the previous year. NYNEX's rationale for shortening the depreciable lives of capitalized equal access assets is that prescribed depreciation rates are not necessary to protect either the consumer or the interexchange carriers. NYNEX believes that the consumers have already benefited from past under-depreciation, which has created a reserve deficiency of $25 billion. Thus, accelerated depreciation of equipment used for equal access would reduce the reserve deficiency and would aid the former Bell Operating Companies (BOCs) in upgrading their facilities, as necessary, to provide equal access. NYNEX believes that the true-up procedure it proposes would help offset the possibility that, by deferring equal access expenses, the BOCs may be unable to recover those expenses in later years as interexchange carriers resort to bypass of the local exchange. Moreover, NYNEX states that an annual true-up would merely be a modification of the method for deferring equal access expenses to balance the interests of the BOCs and the interexchange carriers and their customers.

9. Finally, BellSouth has filed a Motion for Stay Pending Reconsideration of the *Equal Access Accounting Order*. In this Motion, BellSouth asserts that present compliance with those portions of that *Order* for which it seeks reconsideration would force it to make certain changes, revise practices and create new mechanisms in its companies' accounting systems. It states that if this Commission finds its Motion for Reconsideration to have merit, the cost and effort involved in changing its accounting systems will have been totally wasted and that undoing that which has been changed would be pointless.

III. Summary of Comments and Reply Comments

10. Public Notice of the various Petitions for Reconsideration was given in FCC Public Notice, Mimeo 2183, released January 24, 1986. Oppositions or comments on these petitions were to be filed with the Commission on or before February 14, 1986 and reply comments on or before February 28, 1986. Oppositions were filed by the American Telephone and Telegraph Company (AT&T) and MCI Communications Corporation (MCI), and comments supporting some of the petitions were filed by Pacific Bell and Nevada Bell (Pacific Companies), the United States Telephone Association (USTA), and United Telephone System, Inc. (UTS). Reply comments were filed by Bell Atlantic, BellSouth, NYNEX, USTA, and US West.

11. In their comments, the Pacific Companies and USTA support proposals to revise the definition of equal access expenses. USTA states that local exchange carriers have voluntarily converted end offices to equal access or have plans to do so in order to attract interexchange carrier business. Therefore, USTA believes that these carriers should not be penalized for voluntary compliance with this Commission's equal access policies by having these costs excluded from the equal access category. The Pacific Companies argue that this Commission's definition of equal access is overly restrictive. They state that carriers which convert offices to meet the MFJ mandate based on a reasonable expectation that interexchange carriers will purchase Feature Group D service should not be precluded from recovering those costs. AT&T, on the other hand, is opposed to the petitioners' request for a change in the definition of equal access expenses. AT&T believes that the exclusion of unrequested conversions from the *Equal Access Accounting Order* definition of equal access costs is correct. AT&T contends that our *Order* provides more than adequate flexibility to deal with the situations cited by NYNEX and BellSouth whereby competitive carriers purchase service shortly after an office has been converted to equal access. Thus, if an end office begins to serve interexchange carriers at any time during the year of conversion, appropriate provision can be made for including amortization of initial conversion expenses in equal access costs by asking the Chief of the Common Carrier Bureau to adjust the write off period to properly reflect economic utility and sound ratemaking principles. Moreover, AT&T states that the *Equal Access Accounting Order* does not prevent the inclusion in equal access costs of depreciation accrued after an office begins to serve competitive interexchange carriers. Finally, AT&T argues that the definition we adopted will not impede the recovery of legitimate conversion costs by local carriers since costs excluded from a separate rate element are nonetheless recoverable through the conventional tariff mechanism, and our definition will not have any effect on AT&T's access cost recovery guarantee.

12. BellSouth, NYNEX and USTA, in their reply comments, restate their petition or comment positions advocating revision of our definition of equal access costs. BellSouth also believes that AT&T's comments fail to address the BOCs' concerns with nonrecovery of costs incurred without a bona fide request and that AT&T's view of the *Order ' s* flexibility is overly simplistic. NYNEX asserts that AT&T is wrong in concluding that our definition will not affect AT&T's equal access cost recovery guarantee because it will be much more difficult to track the recovery of equal access costs if these costs are included in conventional access tariffs. NYNEX also believes AT&T's observation that the expenses of conversion for a one-carrier office could be included in the equal access category, after a competitive carrier other than AT&T subscribed to Feature Group D during the year of conversion, is no panacea. Expenses could not be charged to the equal access deferred account if competitive carriers subscribed to equal access in the year following the year of conversion. This is because the *Equal Access Accounting Order* would require that 100 percent of those expenses be included in the determination of income for the previous year. Thus, that *Order* places the BOCs at risk that expenses projected to be amortized would be disallowed for recovery in equal access tariffs in

subsequent years for offices where competitive carriers did not subscribe to equal access during the year of conversion.

13. USTA and UTS support US West's recommendation that amortization of equal access expenses be abandoned so that these costs can be recovered in the year in which they are incurred. Both respondents state that amortization is an exception to the general rule of ratemaking which permits expenses to be recovered in the year incurred and that amortization is unfair because it imposes costs on future ratepayers which were caused by and were for the benefit of current ratepayers. UTS also argues that equal access expenses are of insufficient magnitude to distort either the financial results or the revenue requirements of local exchange carriers. The Pacific Companies also support abandoning amortization after January 1, 1987 because equal access expenses after that date will no longer be extraordinary or produce fluctuations in revenue requirements. MCI opposes US West's request to recover equal access expenses in the year incurred. MCI contends that US West's suggestion will result in the immediate costs of the coming three years being placed on the present customers for conversion processes that will benefit customers for years to come.

14. USTA and MCI support those petitioners which request that the rolling eight year amortization period be replaced by a single eight year amortization period. USTA states that if amortization is necessary in this Commission's view, then a single eight year period should be used since equal access costs in the later years are expected to be reasonably low. MCI feels that the single eight year amortization period is reasonable and acceptable.

15. AT&T opposes any change to the requirement that equal access expenses be amortized over an eight year period. AT&T states that the claims of BellSouth and NYNEX should be rejected because they merely repeat arguments that were fully addressed in the *Order*. AT&T states that the *Order* recognizes that the bulk of expenses are to be incurred in a relatively short period of time and amortization will prevent irregular and substantial fluctuations in BOC revenue requirements. Moreover, AT&T contends that since most equal access expenses will be incurred early in the guarantee period, this Commission correctly determined that a rolling eight year period would be adequate to accommodate the exchange carriers' concern with cost guarantee requirements.

16. Bell Atlantic, BellSouth, NYNEX, USTA and US West, in their reply comments, restate opposition to the rolling eight year amortization period for equal access expenses. USTA agrees with the Pacific Companies that deferral should cease after January 1, 1987 because expenses after that date are expected to be relatively low. US West restates its position that equal access expenses should be recovered in the year incurred. BellSouth, NYNEX and US West all disagree with AT&T's argument that this Commission's adoption of a series of rolling eight year amortization periods is adequate to accommodate the exchange carriers concern about cost guarantee requirements. US West states that AT&T has offered no facts to support this claim, while NYNEX and BellSouth both assert that the AT&T claim is wrong. NYNEX and BellSouth observe that unless tariffs are filed and approved by January 1, 1994, the costs are not included in the guarantee. Thus, the *Equal Access Accounting Order* virtually assures that the risk of underrecovery of the MFJ equal access expenses will be shifted from AT&T to the BOCs. Finally, BellSouth and NYNEX both claim that they have demonstrated that amortizing equal access expenses through the period ending January 1, 1994 would produce the leveling effect of equal access charges this Commission desired because equal access expenses should be relatively low in the later years.

17. The Pacific Companies, USTA and UTS support those petitioners requesting the elimination of the requirement that amortized equal access expenses be booked ultimately to the original account that would have been charged if these costs had not been deferred. They state that the requirement would impose significant additional burdens in terms of time and expense with no offsetting regulatory or other benefit. MCI, while not opposing this request, states that before allowing carriers to amortize costs to a single account, this Commission must assure that these changes will have no effect on the annual revenue requirement in each year, and that there will be no reduction in the ability to segregate and track each of these costs.

18. Bell Atlantic, BellSouth and USTA, in their reply comments, state that most parties agree that if equal access costs must be deferred and amortized then these costs should only be amortized to one account in order to eliminate unnecessary burden and expense. Bell Atlantic also contends that there is no basis for MCI's concern that the single account proposal would affect annual revenue requirements or the ability to segregate and track equal access costs. Bell Atlantic believes that its proposal would simply change the account to which costs are amortized, not the costs themselves and thus it would not increase the revenue requirement in any year.

19. USTA supports NYNEX's suggestion that capitalized equal access assets should be depreciated by January 1, 1994 rather than over the useful life of the asset. USTA contends that accelerating the depreciation will help reduce the staggering depreciation reserve deficiency that all parties including the Commission recognize as a continuing problem. AT&T, conversely, opposes the NYNEX proposal. AT&T states that NYNEX's contention that depreciating equal access assets over their useful lives is not necessary to protect either the consumer or the interexchange carriers is both unsupported and wrong. AT&T further argues that NYNEX's petition fails to address this Commission's detailed demonstration that the public interest requires equal access assets to be depreciated over their useful lives. Moreover, AT&T believes that a shorter depreciation period would be anticompetitive because it would raise the cost to enter the market and thereby inhibit participation by potential competitors.

20. In its reply comments, BellSouth agrees with NYNEX that the asset lives of equal access assets should be shortened to coincide with the AT&T guarantee period. BellSouth states that the present provisions of the *Equal Access Accounting Order* would exacerbate the capital recovery reserve deficiency of the BellSouth Companies and improperly shift the risk of nonrecovery of these costs from AT&T to the BOCs. NYNEX restates its petition argument that shorter depreciation lives is the only way to eliminate the reserve deficiency. Moreover, NYNEX states that accelerated depreciation would cause rates to rise and thus, its proposal simply would place part of that rate increase on the equal access charge.

21. AT&T and MCI oppose NYNEX's suggestion that the deferred balance of equal access expenses be trued-up on an annual basis. MCI believes that true-ups of underrecovery would be unlawful retroactive ratemaking given that the customers purchased their access services based

upon the presumption that no rates would be charged that exceed the effective tariffed rates. MCI also states that a true-up is unnecessary since the AT&T guarantee provides for the BOCs' under-recovery. AT&T contends that NYNEX's argument must be rejected because there is no true-up issue arising out of the *Order* which this Commission conceivably could consider. AT&T notes that the *Order* declined to consider the true-up requests by deferring final resolution of the question until a tariff has been filed reflecting a true-up. AT&T states that no such tariff filing was before this Commission at the time its comments were filed.

22. NYNEX, in its reply comments, states that AT&T is wrong in arguing that the true-up issue is not properly before this Commission. NYNEX believes that this Commission's deferral of equal access expenses has raised the true-up issue and that it has demonstrated that true-up adjustments would benefit the BOCs, the interexchange carriers and the ratepayers. NYNEX asserts that MCI's charge that the NYNEX proposal is unlawful retroactive ratemaking is incorrect. NYNEX contends that if this Commission adopted the proposal, the adjustments in the deferred equal access expense account would be reflected in the equal access tariffs to be filed by the BOCs. Thus, NYNEX states that customers would not pay for charges that exceeded tariffed rates. Finally, NYNEX believes that MCI's observation that all remaining deficiencies are the total responsibility of AT&T past January 1, 1994 may not reflect the Court's interpretation of the AT&T guarantee. The provison to the MFJ guarantee could bar recovery of such BOC shortfalls from AT&T.

IV. Discussion

23. In the *Equal Access Accounting Order*, we noted that the definition of equal access we were establishing for the purposes of our depreciation and accounting rules appeared to be consistent with a then recent decision of the divestiture court clarifying the scope of the AT&T guarantee. We also observed that even if our definition was not identical to the guarantee definition, the carriers should be able to comply with our *Order* and the Court's requirements.[6] The petitioners and several commenting parties have indicated that our definition should be expanded to include costs of converting all end offices regardless of whether competition exists or a bona fide request for conversion was received. They believe that our decision to exclude such costs was incorrect and penalizes carriers for implementing equal access on an expedited basis. Upon reconsidering this matter, we have concluded that our definition is well grounded and appropriate for its intended purpose and is also consistent with the definition of equal access expenses we adopted based on the Federal-State Joint Board's recommendation.[7] Our use of this definition does not foreclose carriers from recovering all the cost of all used and useful investment in appropriate rate elements and does not foreclose the court from interpreting the scope of the AT&T decree in any manner that is appropriate for that purpose. Thus, we will not amend our definition as the petitioner's suggest.

24. We do not agree with those parties who would expense equal access costs in the year in which they were incurred; or who claim that deferral and amortization necessarily violates sound ratemaking principles. If an unusually high concentration of expenses is incurred over a limited time, we believe the best interests of ratepayers would be met by avoiding substantial rate fluctuations that would result from treating these expenditures in the same manner as normal recurring expenses. We will not, therefore, amend our earlier *Order* to permit expensing these costs as they are incurred.

25. While we will not allow carriers to expense equal access expenses in the year incurred, we find there would be substantial benefit in requiring that equal access expenses be amortized over a single eight year period with a definite termination point at December 31, 1993, rather than a rolling eight year period. We are already on record as not taking a position with respect to the guarantee provisions (See *Order* at para. 33). Thus, the action we are taking here is for different reasons. It appears that our concerns about avoiding substantial irregular fluctuations would be satisfied by using a single eight year amortization period, which would terminate December 31, 1993.[8] Moreover, the specific termination date would shorten the period during which the unamortized balances are entitled to earn a rate of return. Finally, we find that it would reduce administrative burdens for both the carriers and the Commission by shortening the period during which the balances in Account 139 need to be tracked for ratemaking purposes. We also agree with those petitioners who requested that equal access expenses be amortized to one account. We believe that amortizing these costs to a single account would significantly reduce the burden imposed on the carriers as the petitioners claim and that the use of a single account will not inhibit the ability to track these costs. Thus, equal access expenses should be separately identified and recorded in Account 139 (Other deferred charges) and amortized to Account 675 (Other expenses) over a single eight year period.

26. We do not agree with NYNEX's request for a shorter depreciation period for capitalized equal access costs. The issue of shortening the depreciable lives of equal access assets was discussed at considerable length in the *Order* issued earlier and will not be repeated here. See *Order* at paras. 26-32. NYNEX and the other commenting parties have raised no new arguments which would lead us to change our position and we will not shorten the depreciation periods for these assets.

27. The *Equal Access Accounting Order* did not determine that a true-up of equal access costs would or could not be permitted. Thus, there is no decision on this question that can be reconsidered apart from our decision to refrain from deciding the question in this proceeding. No argument has been presented that would lead us to conclude that the question is ripe for decision. We can address the question if and when a tariff charge is filed that purports to reflect the over or under recovery of equal access costs attributable to some prior period.

28. Finally, since we have determined all reconsideration questions presented by the several petitioning parties, we find that BellSouth's Motion for Stay of the *Equal Access Accounting Order* is now moot.

V. Ordering Clauses

29. ACCORDINGLY, IT IS ORDERED That BellSouth's Motion for Stay of the Order, filed on January 9, 1986, IS DISMISSED.

30. IT IS FURTHER ORDERED That the Petitions for reconsideration are GRANTED to the extent provided herein and are otherwise DENIED.

31. IT IS FURTHER ORDERED That the Secretary shall cause a summary of this Memorandum Opinion and Order to be published in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

FOOTNOTES

[1] *Memorandum Opinion and Order*, FCC 85-628, released December 9, 1985 (*Equal Acess Accounting Order*).

[2] Specifically, petitions for reconsideration were filed by the BellSouth Corporation, on behalf of South Central Bell Telephone Company and Southern Bell Telephone and Telegraph Company (BellSouth); New York Telephone and New England Telephone and Telegraph Company (NYNEX); Bell Telephone Company of Pennsylvania, the four Chesapeake and Potomac Telephone Companies, the Diamond State Telephone Company and New Jersey Bell Telephone Company (Bell Atlantic); and Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company and Pacific Northwest Bell Telephone Company (US West).

[3] United States v. American Telephone and Telegraph Co., 552 F. Supp. 131 (D. D.C. 1983), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983).

[4] United States v. Western Electric Co., Inc., 569 F. Supp. 1057, 1123, 1125. (D. D.C. 1983).

[5] Under this method, expenses incurred in 1985 would be fully amortized by the end of 1993 and expenses incurred in 1986 would be fully amortized by the end of 1994, and so on.

[6] Order *at* paras. 18-19.

[7] *Decision and Order, MTS and WATS Market Structure* and *Amendment of Part 67of the Commission's Rules*, CC Docket Nos. 78-72 and 80-286, 51 Fed. Reg. 2708 (January 21, 1986).

[8] Projections supplied by BellSouth with its petition coupled with our own analysis indicate that there would be little difference between the rolling eight year period and the single eight year period amortization methods. Also, we are handling this adjustment in the amortization period even though authority was delegated to the Chief, Common Carrier Bureau only because it is intimately related to other issues raised by carriers. Our delegation of authority to the Chief, Common Carrier Bureau remains unchanged by this Order.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 84-1299

Establishment of Satellite Systems
Providing International Communications

ORION SATELLITE CORPORATION — File No. CSS-83-002-P

For authority to construct, launch and operate an international communications satellite system consisting of two in-orbit satellites and one ground spare

INTERNATIONAL SATELITE, INC. — File Nos. CSS-83-004-P(LA) I-P-C-83-073

For authority to construct, launch and operate a North Atlantic Region Satellite System consisting of two in-orbit satellites and one ground spare

RCA AMERICAN COMMUNICATIONS, INC. — File No. I-T-C-84-085

For modification of authority to construct, launch and position a sixth in-orbit communications satellite to permit coverage of portions of Europe and Africa

PAN AMERICAN SATELITE CORPORATION — File No. CSS-84-004-P(LA)

For authority to construct, launch and operate a subregional Western Hemisphere satellite system consisting of two in-orbit satellites

CYGNUS SATELLITE CORPORATION — File No. CSS-84-002-P(LA)

For authority to construct, launch and operate a North Atlantic regional satellite system consisting of two in-orbit satellites and one ground-spare

FINANCIAL SATELLITE CORPORATION — File No. CSS-85-004-P(LA)

For authority to construct, launch and operate a customized private Atlantic and Pacific Ocean region communications satellite system

MEMORANDUM OPINION AND ORDER

Adopted: October 23, 1986 Released: November 5, 1986

By the Commission: Commissioner Dennis not participating.

1. We have under consideration a Petition for Reconsideration filed by Communications Satellite Corporation (Comsat) of a portion of our Memorandum Opinion & Order, CC Docket No. 84-1299, FCC 86-144 (released April 17, 1986) (Reconsideration Order) in the above-captioned matter. The Reconsideration Order partly denied and partly granted petitions for reconsideration of our Report and Order in the Establishment of Satellite Systems Providing International Communications, CC Docket No. 84-1299, 101 FCC 2d 1046 (1985) (Separate Systems decision).

2. Comsat's petition is opposed by the National Telecommunications and Information Administration (NTIA), International Satellite, Inc. (ISI), Pan American Satellite Corporation (PanAmSat), McCaw Space Technologies, Inc. (McCaw SpaceTech), RCA Communications, Inc. (RCA), Capital Cities/ABC, Inc., CBS, Inc. and National Broadcasting Company, Inc. (the three Networks), and Turner Broadcasting System, Inc. (TBS). Comsat replied to these oppositions.

3. Comsat's petition requests reconsideration of that portion of the Commission's *Reconsideration Order* in which the Commission determined that separate satellite system operators and their resellers may provide occasional use television and any other services not interconnected with the public-switched network pursuant to a one-year minimum requirements contract. In making this determination, the Commission interpreted a letter to the Commission from the Departments of State and Commerce (Dougan-Joyce letter)[1] which addresses the meaning of the words "long-term" used in the November 28, 1984 joint letter from Secretaries Shultz and Baldrige transmitting President Reagan's November 1984 international satellite determination.[2] The Shultz-Baldrige letter restricted separate satellite systems ". . . to providing services through the sale or long-term lease of transponders or space segment capacity for communications not interconnected with public-switched message networks except for emergency restoration services." The Dougan-Joyce letter was occasioned by questions as to whether the words "long-term" precluded separate systems from providing "occasional use" television transmission services.

4. In our *Separate Systems* decision, we concluded that the long-term lease requirement of the Shultz-Baldrige letter effectively precluded separate satellite systems from providing occasional use television services. Several separate systems applicants, along with the three television networks, petitioned for reconsideration of this issue.[3] In our *Reconsideration Order*, we determined that the Dougan-Joyce letter clarifies the intended meaning of the words "long-term" in such a way as to permit the provision of occasional use television service and any other services that may be offered by separate systems under the operational restrictions placed on them by the Shultz-Baldrige letter. We concluded that the Shultz-Baldrige letter permits separate system operators and their resellers to enter into one-year "requirements" contracts with customers for occasional use television services or any other

services that may be provided over separate systems.[4] Comsat challenges the correctness of our interpretation of the Dougan-Joyce letter.

5. In its petition, Comsat maintains that the Commission's interpretation of the Dougan-Joyce letter virtually nullifies the long-term lease requirements, especially if that interpretation is extended to cover services in addition to television. It maintains that if a customer can sign a requirements contract for occasional services, and pay only for the capacity used, the long-term lease provision is essentially meaningless. Additionally, Comsat argues that the written instructions it received as the U. S. signatory to INTELSAT demonstrate conclusively that the Commission's interpretation of the long-term lease requirement is incorrect. Comsat asks the Commission to reverse its decision and conclude that requirements contracts are not permissible under the Executive branch restrictions, whether for occasional use television service or for any other service. Rather, says Comsat, any leased channel service provided by separate systems must be based on a minimum one-year financial commitment from the customer.

6. NTIA opposes Comsat's petition and states that the instructions in question are irrelevant to the instant proceeding. It states that the Dougan-Joyce letter contains the Executive branch's advice to the Commission which properly applied it. NTIA argues that Comsat has taken its INTELSAT instructions out of context and attempted to fashion a conflict with the Executive branch and the Commission's determination herein. It further argues that Comsat's position in this proceeding is internally inconsistent. In its earlier comments filed in response to the petitions for reconsideration of the *Separate Systems* decision, Comsat stated that the Presidential Determination (PD-85-2) contemplates that any authorized entities must be limited to "sales" or "long-term leases" of facilities. However, no specific restrictions regarding a minimum duration of use were stated. In its present petition, however, Comsat changes its view by asserting that "long term" lease contemplates both a minimum contract duration and a minimum use. Comsat's contentions are therefore inconsistent and cannot be sustained.

7. ISI argues that there are both procedural and substantive defects in Comsat's petition. ISI maintains that Comsat re-argues matters already disposed of. It disagrees with Comsat's argument that the Commission's interpretation of the Dougan-Joyce letter is erroneous. ISI submits that the instructional language relied on by Comsat to reinterpret the Executive branch's views was actually before the Commission prior to adoption of the *Reconsideration Order*. As such, it does not qualify as newly discovered evidence relevant to the issue. Moreover, Comsat's reliance on instructions given in a context and for reasons not fully disclosed is unpersuasive and has no probative value. Substantively, ISI maintains that Comsat's argument is convoluted. It states that if Comsat is unhappy with the Executive branch's views, its remedy lies with that branch and not with the Commission which has only adopted and carried forward the policy as articulated and interpreted by the Executive branch.

8. McCaw SpaceTech maintains that contrary to Comsat's assertion, the Commission's finding permitting separate satellite systems operators and resellers to offer occasional use services pursuant to long-term agreements is fully consistent with the Executive branch's position as clarified by the Dougan-Joyce letter. In McCaw SpaceTech's view, the March 4, 1986 instruction to Comsat merely acknowledges that the Commission is currently reviewing the issue for final determination rather than reaching a definitive conclusion in the matter. Moreover, as a practical matter, the application of Comsat's own interpretation would result in idle satellite capacity which is inconsistent with the Commission's strong commitment to maintain efficient use of the orbit/spectrum resource. McCaw SpaceTech contends that the Dougan-Joyce letter supports the Commission's interpretation that all international satellite services may be offered on a non-continuous use basis. That letter addresses the issue of occasional use in terms of television service because that was the context within which the issue arose. It does not limit its finding to television service only, but to any other services so long as they are not interconnected with the public switched network.

9. RCA states that the April 4, 1986 instruction letter has no probative value in the instant proceeding. The instructions gives Comsat the appropriate response to make to the 66th INTELSAT Board of Governors meeting. Comsat's petition is procedurally defective because the "newly revealed" facts were previously withheld from public record. Furthermore, the instruction letter is not a statement of public policy that could be expounded on; neither should it be used inferentially. RCA also contends that it is not at all clear from a fair reading the petition what Comsat's position is. Comsat argues that video, or any other service, must be based on a minimum one-year financial commitment from the customer. Nowhere does Comsat explain what a "one-year financial commitment" is. Finally, RCA maintains that occasional-use TV by separate systems will not harm INTELSAT economically.

10. The three networks (ABC, CBS and NBC) claim that Comsat is re-arguing an issue that has already been deliberated and resolved. There are no new facts or changed circumstances to support a reargument. Thus, the petition violates Section 1.429(b) of the Commission's Rules. The networks state that Comsat's petition presents the Commission with a classic case of a petitioner wanting one more bite of the apple – after the Commission already has considered thoroughly and rejected the arguments presented in the first bite. While the networks do not take a position concerning the application of the Dougan-Joyce letter to services other than television, they emphasize that television transmission services are not typically interconnected with public-switched message networks and would not be used as a substitute for those services which could be carried over the public switched network.

11. TBS argues that Comsat attempts to gloss over the manifest intent of the Dougan-Joyce letter, notwithstanding its own recognition that television transmissions are a special case because they are not interconnected with the public switched network. TBS maintains that the Dougan-Joyce letter applies to the length of the basic contract, and does not require that transponder capacity be used continuously.

12. In reply to the above comments, Comsat claims that at the time the petition was filed, it believed (and still does) that the Commission's interpretation of the Dougan-Joyce letter was inconsistent with the April 4, 1986 instructions Comsat received. Thus, it sought approval from the State Department for release of all relevant portions of the guidance instructions. Comsat urges the Commission to reconsider this point and rule that – at least for services other than occasional use television –separate systems may not enter into requirements con-

tracts. If, however, the Commission rules instead that such contracts are permissible for all separate system services, it should revise its conclusions as to the potential for economic harm to INTELSAT.

DISCUSSION

13. With this further Reconsideration Order, we affirm our previous finding that, based on the Dougan-Joyce letter, occasional use television or any other services not interconnected with the public switched network can be provided by separate systems operators and resellers of separate systems capacity under a one-year minimum requirements contract. Below we find that our interpretation of the Dougan-Joyce letter is correct and is consistent with the intent of the Executive branch's operational restrictions as adopted in our *Separate Systems* decision, that this interpretation is consistent with the instruction letter of March 4, 1986 to Comsat, that the long-term lease requirement remains meaningful in practical application, and that permitting occasional use television and other services to be provided under requirements contracts will not result in economic harm to INTELSAT.

14. The Shultz-Baldrige letter did not specify the length of "long-term" leases within the meaning of the operational restrictions that it imposed on separate satellite systems. Therefore, we decided in our *Separate Systems* decision that implementation of the long-term lease restriction required us to define a minimum period for a lease. We held that the minimum lease period of a "long term" lease would be based on one year's use and that it would apply to resellers as well as to separate systems operators. We recognized however that the long-term lease requirement effectively precluded separate systems from providing occasional use television services. We said that while we would have reached a different result under different circumstances, we had no choice but to give effect to this facet of the Executive branch restrictions. There simply was no basis at that time to interpret the language of the Executive branch restrictions in any other fashion. Thus, we found that, notwithstanding the fact that television service is not interconnected with the public switched network, the language of the Executive branch restriction does not permit, absent clarification from the same branch, a finding that television service is to be exempt from the long-term lease requirements.

15. Subsequent to the release of the *Separate Systems* decision, several parties petitioned for reconsideration of the application of the long-term lease requirement to occasional use television. They argued that the restriction is unnecessary to achieve the objective of protecting INTELSAT from economic harm, and will frustrate the objective of fostering competition in international satellite communications. In addition, we received the Dougan-Joyce letter which sought to clarify this issue. The Dougan-Joyce letter, in pertinent part, states as follows:

> Intermittent use of satellite capacity for television transmission pursuant to a long-term contract would be consistent with the President's Determination and the criteria established in the Shultz-Baldrige letter. *The adjective " long term " used in that letter applies to the basic contractual agreement. Its use was not intended to express a requirement that capacity be used continuously.*
>
> Our view that "occasional use" television is permissible, if pursuant to a long-term contract, is reinforced by the fact that television transmission services – whether full-time or "occasional use" – are not typically "interconnected with public-switched message networks." Contracts to satisfy television transmission needs should be allowed as long as the acquired transmission capacity is not interconnected with public-switched message networks and any lease agreement (as distinguished from a sale) to provide that capacity is "long term." (Emphasis added. *See* Appendix A for full text of the letter.)

16. In our *Reconsideration Order*, we found that the Dougan-Joyce letter clarifies the intended meaning of "long-term' lease in such a way as to permit the provision of occasional use television service while remaining consistent with the operational restrictions placed on separate systems. According to the letter, the adjective "long term" applies to the basic contractual agreement and is not intended to require that capacity be used continuously. We concluded that the letter permits separate systems operators and resellers to enter into "requirements" contracts with customers for occasional use television services or any other services so long as they comply with the Executive branch operational restrictions.[5] We found that such requirements contract must be for a minimum period of one year but need not require customers to acquire or use space segment capacity on a continuous basis.

17. Comsat challenges our decision on several grounds. First, it maintains that "long term" means that separate systems may agree to provide services on the basis of a minimum one year financial commitment by the customer for the capacity involved, regardless of how often the capacity is actually used. Comsat asserts that the Dougan-Joyce letter does not mean that separate systems could agree to service arrangements predicated on charging for so many days or hours of service per year.

18. We rejected this position in our *Reconsideration Order*. We do so here. The proper meaning of "long-term" is clearly demonstrated by the language used in the two ending sentences of the first paragraph quoted above of the Dougan-Joyce letter. The Executive branch states unequivocably that the adjective "long-term" used applies to the basic contractual agreement, and its use is not intended to express a requirement that capacity be used continuously. Thus, "long-term" means non-continuous use based on a one-year requirements contract entered into between the separate systems operator and its customer. It does not mean that the customer is to acquire the contract by making a one-year financial commitment. Nowhere does the Dougan-Joyce letter, express or implied, suggest such an arrangement. Comsat's distorted reasoning, taken to its logical conclusion, would mean that all customers must pay for a full year's service regardless of actual use. This result would be contrary to the accepted understanding of what occasional use television is, even though the Dougan-Joyce letter clearly states that occasional use television service is permitted.

19. Second, Comsat challenges our finding that requirements contracts are permissible not only to occasional use television services, but for any other services that may be provided over separate systems. However, we continue to believe that this finding is correct. The Dougan-Joyce letter did not establish a narrow exception for occasional

use television service. Rather, its clarification of the term "long-term" is generic and therefore applies to all permissible services. The basis of this proposition can be traced to the Shultz-Baldrige letter where it states, in part, that ". . . (1) each system is to be restricted to providing services through the sale or long-term lease of transponders of space segment capacity for communications not interconnected with the public-switched message networks (except for emergency restoration services) . . ." (*See* Appendix B). Clearly, the language of the Shultz-Baldrige letter, including long-term lease restrictions, applies to all services. The Dougan-Joyce letter clarified the meaning of long-term lease. It did not create a separate definition to apply to television services only.

20. This finding is firmly supported by NTIA, which was co-signor of the Dougan-Joyce letter and which is the Executive branch agency principally responsible for the development of domestic and international telecommunications and information policy. NTIA states that "[T]he fact that the letter responded to a petition focusing on occasional use television did not alter the letter's substance. The operative language in its second paragraph interpreting the phrase "long-term" is not tied to television service. Rather, any service which meets the long-term lease requirement of that paragraph *and* which meets the "not interconnected with the public-switched message networks" standard – as the third paragraph of the letter notes television transmission does – would comply with the Executive branch restrictions. This was precisely the conclusion reached by the Commission."[6]

21. NTIA's statement should resolve any uncertainties that Comsat may have in this regard. In any event, we believe that any interpretation to the contrary would simply undermine the express intent and policy goals of the Executive branch. To say that "long-term" lease applies to television service only is to permit an arbitrary distinction to be made between the types of permissible services to be offered by separate systems. Neither the Shultz-Baldrige letter nor the Dougan-Joyce letter makes such a distinction. Accordingly, we affirm our interpretation of the term "long-term" lease in the *Reconsideration Order* and that such leases apply to both occasional use television and any other services, which otherwise may be provided consistent with the Executive branch operations restrictions.

22. Third, Comsat maintains that our reading of the Dougan-Joyce letter is contrary to the explicit, written instructions issued by the Executive branch to Comsat as the U.S. signatory to INTELSAT.[7] In a contribution to the 66th INELSAT Board of Governors Meeting,[8] INTELSAT's Director General claimed that the Dougan-Joyce interpretation of the long-term lease restriction raises extremely serious questions – not simply for its obvious impact on occasional use television services but primarily for the full impact the logical extension of such reasoning could have. The Director General asserted that almost any service could be provided pursuant to long-term contract under this interpretation. He concluded that the long-term lease restriction would be effectively negated and only the "non-interconnection restriction" would be left to protect INTELSAT from significant economic harm.

23. In response to these statements, the U.S. government issued the following instructions to Comsat:

> The Signatory shall not initiate any discussion of BG 66-20. Should a discussion prove unavoidable, the Signatory shall downplay the issue by merely noting the paper as a statement of opinion. Only if merited as a response to further discussion, the Signatory shall state that the Director General's interpretation of the joint letter from the Departments of State and Commerce to the FCC is without foundation. The Executive Branch is of the view that the comments are taken out of context. The purpose of the letter was to clarify that the "long-term lease or sale" aspect of the restrictions on separate systems applies to occasional use television services. This issue is currently before the FCC.

24. Comsat contends that the instruction that it received demontrates conclusively that the Commission's interpretation of the long-term lease requirement is incorrect and that the Commission has misconstrued the contents of the Dougan-Joyce letter. Comsat states that there is no significant difference between the Director General's reading of the Dougan-Joyce letter and the Commission's reading. Both say that requirement contracts are applicable to occasional use television and any other services as well. Comsat reasons that since the instruction letter characterizes the Director General's interpretation as without foundation, it follows that the Commission's interpretation must also be without foundation. NTIA responds that the instructions cited by Comsat are irrelevant to this proceeding and that the Dougan-Joyce letter contains the Executive branch's advice to the Commission which properly applied it.

25. Comsat's argument is without merit. It is based on the premise that our interpretation of the Dougan-Joyce letter is inconsistent with the U.S. government's instruction letter. Because the instruction letter states that the Director General's interpretation of the Dougan-Joyce letter is without foundation, Comsat concludes that the Commission's interpretation is also without foundation. This conclusion is simply erroneous. What the U.S. government found objectionable and therefore without foundation is the tone and implication of the Director General's interpretation. As NTIA states, the Director General's claims are exaggerated. The Director General's statement that "the only remaining service restriction intended by the FCC to protect INTELSAT from significant economic harm would be the prohibition on interconnection with the public-switched network " is wrong, and, accordingly, without foundation.

26. The long-term lease restriction remains in place and applies to all services provided by separate systems under the Executive branch operational limitations. It continues to be a meaningful restriction that will work in tandem with the non-interconnection restriction to protect INTELSAT from significant economic harm. We disagree with Comsat's argument that there is no functional difference between services that are offered under a requirements contract and those that are offered on demand. The requirements contract that we envision would provide for a minimum one-year lease fixed term contractual relationship for goods or services to be provided by the separate system operator to meet the customer's requirements. It should contain terms setting forth a maximum amount of units of capacity. However, consistent with our *Separate Systems* decision, no minimum unit of capacity need be defined.[9] The essential test is that at the time the contract is entered into between the parties, the customer must indicate in good faith the fixed or *maximum* quantity it foreseeably needs for that year, and the supplier is bound to provide up to that maximum quantity needed

within the period of the contract. The customer may choose not to use the full amount of capacity contracted for. However, the separate systems operator would be obligated to make the capacity available, thus surrendering his right to sell the capacity to other customers, perhaps for a higher price. Conceptually, this arrangement represents a detriment to the service provider while at the same time binds the parties to a long-term contractual relationship. It is also consistent with the Executive branch's long-term lease restriction. And, since services offered under requirements contracts are subject to a mutuality of obligations between the parties who are held to operate in good faith and in accordance with general contractual and commercial terms, it is distinguishable from INTELSAT services that are offered purely on demand with no such obligations attached.

27. Moreover, it is clear that the inclusion of services other than occasional use television services under a requirements contract will not result in significant economic harm to INTELSAT. Based on INTELSAT's 1984 revenue figures,[10] our analysis shows that even where occasional use of *all* permissible services not interconnected with the public switched network are taken into account, the percentage of INTELSAT revenues potentially affected is 6.77 percent, representing a mere increase of 0.22 percent from our previous estimate of 6.5 percent.[11]

28. As a final matter, we agree with NTIA that disclosure of the instruction letter represents an unwarranted attempt by Comsat to exploit its unique position as U.S. signatory to INTELSAT when the information is not routinely made to other parties.[12] Letters of instructions are routinely issued by the State Department after full consultation with NTIA and the Commission.[13] Often, instruction letters contain hypothetical situations which might or might not arise during debate, and Comsat is instructed to address certain matters or adopt certain positions during the debate. Instructions are sometimes amended prior to or during the meeting by oral directions from the U. S. government. Thus, instruction letters to Comsat cannot necessarily be viewed as final U.S. positions but only as a link in the deliberative process. As such, and in view of the transitory nature of instruction letters, disclosure by the U.S. signatory could easily prejudice the operation of the government's internal deliberative process and we do not condone this practice.

CONCLUSION

29. In view of the above, we affirm the finding in our *Reconsideration Order* that separate systems operators and their resellers may provide occasional use television or any other services not interconnected with the public switched network under a one-year minimum requirements contract. We find that our interpretation of the Dougan-Joyce letter is correct and is consistent with the intent of the Executive branch's operational restrictions as adopted in our *Separate Systems* decision, that this interpretation is consistent with the instruction letter of March 4, 1986 to Comsat, that the long-term lease requirement remains meaningful in practical application, and that permitting occasional use television and other services to be provided under requirements contracts will not result in economic harm to INTELSAT.

30. According, IT IS ORDERED that the Petition for Reconsideration filed by Communications Satellite Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

FOOTNOTES

[1] Letter from Diana L. Dougan, Coordinator and Director, Bureau of International Communications and Information Policy, Department of State and Rodney L. Joyce, Acting Secretary for Communications and Information, Department of Commerce, to Mark S. Fowler, Chairman, Federal Communications Commission, dated January 10, 1986 (Dougan-Joyce letter).

[2] On November 28, 1984 President Reagan signed a Presidential Determination (PD No. 85-2) that alternative satellite systems were required in the national interest within the meaning of Sections 102(d) and 201(a) of the Communications Satellite Act of 1962, 47 U.S.C. 701(d) and 721(a).

[3] The following entities filed petitions for reconsideration: International Satellite, Inc., Pan American Satellite Corporation, RCA Communications, Inc. and American Broadcasting Company, Inc., CBS Inc. and National Broadcasting Company, Inc. (filing jointly).

[4] Separate Systems Reconsideration Order, CC Docket No. 84-1299, FCC 86-144 (released April 17, 1986) at para. 32.

[5] A requirements contract provides for a fixed term contractual relationship, but no fixed product amount. The goods or services contracted for will be provided by the seller to meet the requirements of the buyer. Such contracts normally contain a term setting a maximum amount of goods or services.

[6] NTIA's comments at pgs. 4 and 5.

[7] Comsat includes an instruction letter with its petition. Several parties question the timeliness of the disclosure of this information which was not previously available to them. The long-term lease issue has been before the Commission since Comsat filed its petition for reconsideration of the *Separate Systems* decision. In that petition, Comsat argued that the long-term lease restriction should be expanded to require full-time use of space segment and to prohibit sharing of capacity. It also sent a letter to the Commission stating its own interpretation of the Dougan-Joyce letter. *Letter from John S. Hannon, Vice President and General Counsel, Comsat Space Communications Division, to Mark S. Fowler, Chairman, Federal Communications Commission, dated March 4, 1986.* Had Comsat decided to seek State Department permission to disclose the instruction letter then, it could have done so during the course of that proceeding. Rather, Comsat waited until the issue had been duly deliberated and resolved in the *Reconsideration Order* and then filed a petition for further reconsideration, again asking the Commission to reconsider this issue. It is no defense to say that it would have taken considerable time for Comsat to receive the disclosure permission from the State Department; hence the delay. In actual fact, Comsat sent a written request to the State Department on June 13, 1986 and the request was granted the same day. *See letters from Comsat to the State Department and its reply, both dated June 13, 1986.* We agree with ISI and RCA that the contents of the disclosure are not newly-discovered evidence and as such fall short of the requirements mandated

in Section 1.429(b) of our Rules. Nevertheless, we will consider the implications of the instruction letter to avoid any further misunderstanding of this issue.

[8] Contributions of the Director General, "Events in the U.S. Relating to Separate International Communication Satellite Systems," BG-66-20E (February 20, 1986).

[9] Neither the language of the Executive branch restrictions nor the White Paper define a minimum unit of space segment capacity which a separate system may offer. We find no need to establish a minimum unit of capacity. In fact, the White Paper suggests that capacity as small as a single voice-grade circuit could be offered. *White Paper at pg. 42.*

[10] INTELSAT Documents, "INTELSAT Financial Statement for Year Ended 31 December, 1984", Attachment No. 1, BG-62-13E (February 11, 1985).

[11] In the *Separate Systems* decision, we found that, with the restrictions we imposed, at most 2.0 percent of INTELSAT's 1984 revenues would have been accessible by separate satellite systems. We later revised this estimate to include occasional use television revenue as well as service revenues in the Pacific Ocean Region. The result is that the percentage of revenues potentially affected increases to 6.5 percent. The difference between our original estimate of 2.0 percent and the later estimate of 6.5 percent is primarily due to the addition of $10.3 million for occasional use television revenues for the Atlantic Ocean Region in 1984 and $2.5 million for the occasional use television, private line services and circuit restoration services in the Pacific Ocean Region in 1984. (The Pacific Ocean Region revenues were excluded from our original revenue estimate because none of the systems under consideration at the time of our *Separate Systems* decision was adopted had proposed to provide satellite service in that area of the world.) Adding these revenues to our original estimate of $7.4 million increases the affected revenues to $24.1 million, which also takes into account the difference between our original estimate of $3.7 million for private line service for U.S.-Europe and our 1984 estimate of $5.3 million for private line service between the U.S. and countries in the Atlantic Ocean Region. Accordingly, the percentage of INTELSAT's international revenues that are affected raised from 2.0 percent to 6.5 percent. If this estimate is again revised to include the occasional use of "all other services" not interconnected with the public switched network, the additional revenues affected totals $786,545. This amount is composed of Pacific Ocean other occasional use revenues in the amount of $375,205 and Atlantic Ocean other occasional use revenues in the amount of $411,340. Adding the $786,545 to the $24.1 million increases the affected percentage of INTELSAT's international revenues from the above 6.5 percent to 6.77 percent.

[12] NTIA states that Comsat has taken its INTELSAT instructions out of context and attempting to fashion a conflict with the Executive branch and the Commission's determination herein. It deplores Comsat's attempt to exploit its access to instructions provided in confidence for use in international negotiations, and, in accord with Comsat's vigorous arguments, customarily restricted from public distribution. Comsat replies that the disclosure was both necessary and appropriate. It maintains that at the time it filed the June 13, 1986 petition, it believed (and still does) that the the instruction it had received represented a major change in previously enunciated U.S. policy.

[13] Comsat cites some language in a letter from the Chief, Common Carrier Bureau to the effect that the State Department is the agency most qualified to consider release of guidance materials, that guidance letters are drafted and signed by State Department personnel and it is the State Department that is ultimately responsible for the instructions it gives to Comsat. *Letter from Albert Halprin to Raul R. Rodriguez, dated August 16, 1985* (*FOIA* Control No. 85-126). Comsat has attempted to take this language totally out of context. The Bureau's letter addressed a Freedom of Information request where a party asked to see several letters of instruction from the State Department to Comsat at the 63rd Board of Governors meeting. The sole question there was which government agency was in the best position to authorize release; whereas, the issue here is whether disclosure of the instruction letter is itself appropriate and relevant to the instant proceeding.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 85-88

Detariffing of Billing and Collection Services

MEMORANDUM OPINION AND ORDER

Adopted: October 23, 1986; Released: November 6, 1986

By the Commission: Commissioner Dennis not participating.

1. MCI Telecommunications Corporation (MCI) has filed a petition for reconsideration and Southwestern Bell Telephone Company (SWB) has filed a petition for reconsideration and clarification of our Report and Order detariffing billing and collection services effective January 1, 1987.[1] As discussed below, we deny these petitions.[2]

I. BACKGROUND

2. Our *Detariffing Order* deregulated the provision of billing and collection service – a service whereby a local exchange carrier bills and collects for interexchange carriers the charges due from end users subscribing to an interexchange carrier's interstate service. In that Order, we found that third party billing and collection is not a common carrier communications service subject to regulation under Title II of the Communications Act, 47 U.S.C. §§ 201-224, (the Act) but rather, is a financial and administrative service. *Detariffing Order* at 1168-69. We also concluded that sufficient competition for billing and collection service exists to allow market forces to discipline excessive rates or unreasonable practices by exchange carriers in this area and that the ability of interexchange carriers to perform their own billing and collection will put downward pressure on rates for this service. *Id.* at 1169-71. Thus, we declined to exercise our Title I jurisdiction, 47 U.S.C. §§ 151-156, over billing and collection. *Detariffing Order* at 1169-71. Because the recording function[3] of billing and collection cannot generally be performed by other third party billing vendors, however, and because the ability of interexchange carriers to perform their own recording is tied to the availability of Feature Group D, we held that exchange carriers should be required under Title I of the Act to continue offering recording service, on an untariffed basis, through 1989 or until the equal access conversion process is complete. *Id.* at 1173-74.

3. In order to allow time for a smooth transition to deregulated environment, we required that all billing and collection services continue to be offered under tariff through the end of 1986. *Id.* at 1171-73. We further provided that deregulated interstate billing and collection costs are to be calculated in accordance with our existing Part 67 separations and Part 69 access charge cost allocation rules, 47 C.F.R. Parts 67 and 69, until permanent rules are adopted for the allocation of joint and common costs between regulated and unregulated activities.[4] We decided to continue to defer to state regulatory authorities with respect to the practice of disconnecting a subscriber's local telephone service for nonpayment of interstate toll charges. *Id.* at 1176-77. Finally, we held that our decision to deregulate local exchange carrier billing and collection for interstate services of interexchange carriers should preclude state regulation of such interstate services. *Id.* at 1177.

II. PLEADINGS

4. SWB first challenges our requirement that carriers allocate their billing and collection costs according to Parts 67 and 69 pending the adoption of permanent joint and common cost allocation rules. SWB argues that efficient planning for the structure and pricing of detariffed services is not possible until an appropriate costing methodology is developed for these services and that the development of this methodology is also essential to the economic viability of the detariffed services. SWB asserts that the use of Part 67 and Part 69 procedures is inappropriate for determining the costs to be assigned to a competitive, detariffed service such as billing and collection. SWB claims that the use of these allocation procedures will produce costs which greatly exceed the direct cost of providing billing and collection services. For example, SWB claims, the loss of billing and collection business from AT&T will cause a significant shift of costs to the intrastate jurisdiction without significant avoidable costs, due to the allocation of local commercial operations (Account 645) costs according to relative interstate/intrastate revenues. In addition, according to SWB, a major portion of revenue accounting (Account 662) costs, a large component of billing and collection costs, continues to be separated based upon relative account "users." Thus, claims SWB, the interstate billing and collection costs allocated to this category will also exceed direct costs.

5. In addition to producing these non-cost-based allocations of direct costs, SWB also claims that the use of Parts 67 and 69 of our Rules will result in significant assignments of indirect costs to billing and collection, even though such costs are not related to the cost of providing the service, because other general expense and investment accounts "follow" the allocation of Accounts 645 and 662. SWB estimates that, of the costs which would be assigned to its billing and collection services using Parts 67 and 69, approximately 50 percent would be indirect costs. Furthermore, in comparing SWB's estimates of the direct costs for billing and collection with the Part 67 and Part 69 cost assignment estimates, SWB figures that the direct costs of providing the service are only half of the costs produced by Parts 67 and 69.

6. SWB asserts that a new cost allocation approach must be developed for billing and collection service prior to detariffing if the service is to be completely viable. SWB refers to CC Docket No. 86-111 as an appropriate vehicle. SWB contends that the current January 1, 1987 detariffing date should be deferred pending the implementation of rules being developed in CC Docket 86-111 since the use of inappropriate Part 67 and Part 69 rules may affect the financial viability of this service in a competitive environment. In addition, SWB claims, a deferral may avoid duplicative efforts if the existing Part 67 and Part 69 procedures are replaced by new procedures developed in CC Docket 86-111.

7. SWB next requests clarification of our preemption of state regulation of billing and collection. SWB argues that since it is clear that the states have no jurisdiction to regulate interstate services, the extent to which we intended to preempt state regulation of billing and collection services in paragraph 52 of the *Detariffing Order* is not clear. SWB claims that it cannot be an effective competitor in the market for billing and collection services unless it can structure and price its offerings consistently in both jurisdictions. SWB asks that, if we did not intend to preempt all state regulation of billing and collection, we allow SWB additional time before detariffing to seek relief from the state commissions.

8. MCI's petition for reconsideration challenges our treatment of billing name and address (BNA) information. MCI asserts that we should exercise Title I jurisdiction over BNA service, which is performed as a function of network switching operations, since OCCs need this information to perform their own billing or to employ vendors to bill for non-presubscribed traffic. MCI claims that the local exchange carriers, as the sole source of BNA information, have a monopoly over the compilation of BNA information for all other common carrier (OCC) traffic where equal access is not available and for non-presubscribed 10XXX or other traffic where equal access is available. According to MCI, BNA is a service that interexchange carriers cannot provide for themselves and that cannot be provided for them by third-party vendors. Thus, says MCI, we should require the LECs to offer the service under tariff and on an unbundled basis, thereby ensuring the availability of BNA at cost-based rates and on reasonable terms and conditions.

9. Most of the comments filed in response to the petitions oppose them, arguing generally that deferral of the *Detariffing Order* is inappropriate, that clarification of that Order's preemptive effect is unnecessary and that MCI has not offered sufficient reasons why BNA information must continue to be tariffed. Several commenters support SWB's request to defer billing and collection detariffing pending the outcome of CC Docket 86-111.[5] These commenters request, however, that if CC Docket 86-111 is not completed before the currently scheduled detariffing date of January 1, 1987, we allow the current billing and collection tariffs to remain in effect until CC Docket 86-111 is completed and that carriers be relieved of the requirement that comprehensive billing and collection tariffs be filed on October 3, 1986.

III. DISCUSSION

10. We have reviewed the petitions and comments and conclude that the detariffing of billing and collection should take place as scheduled on January 1, 1987. The issues raised by the petitioners do not persuade us that potential problems in the implementation of detariffing are significant enough to warrant delay. SWB has not demonstrated that the cost allocation problems which it alleges will occur have been aggravated by the detariffing of billing and collection service. SWB would face the problems discussed in its petition whether or not billing and collection service were offered under tariff. However, detariffing will allow carriers more flexibility in pricing this service. Furthermore, cost allocation and separations issues which affect billing and collection service are being examined in other Commission proceedings which address these issues generically.

11. The *Detariffing Order* did not adopt all of the technical revisions in the Part 69 access charge rules that are necessary to reflect our decision to use Part 69 allocations to determine the costs attributable to the deregulated activity. Although that decision will be reevaluated in the Docket 86-111 proceeding, we do not anticipate that any rules adopted in that proceeding will be effective on January 1. Accordingly, we are revising the Part 69 rules effective January 1 to change references to the billing and collection element to describe a billing and collection category. Those Part 69 revisions are contained in the Appendix.

12. We are not persuaded that clarification or expansion of our preemption, as requested by SWB, is necessary. Paragraph 52 of the *Detariffing Order* states clearly that state regulation of local exchange carrier billing and collection for interstate services of interexchange carriers is preempted. Our Order did not discuss federal preemption of *intrastate* billing and collection services, and the record in this proceeding to date does not support such preemption.[6]

13. Finally, we also reject MCI's proposal to continue tariffing BNA information. In deciding not to assert Title I jurisdiction over billing and collection generally, we relied on our expectation that local exchange carriers will continue to make BNA information available on a reasonable basis, and we stated that we would consider requiring carriers to make this information available to interexchange carriers if problems develop. *Detariffing Order* at 1171, n.53. We fully expect local exchange carriers to make BNA information readily available at reasonable prices, and we will not hesitate to take appropriate action if these concerns are not met.

14. Pursuant to Section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. § 605(b), it is certified that Sections 603 and 604 of the Regulatory Flexibility Act do not apply to this proceeding because billing and collection costs are presently allocated in accordance with these rules. These final rules do not change this allocation and do not impose additional costs or burdens on local exchange carriers or interexchange carriers.

IV. ORDERING CLAUSES

15. Accordingly, IT IS ORDERED that the petitions for reconsideration filed by Southwestern Bell Telephone Company and MCI Telecommunications Corporation ARE DENIED.

16. IT IS FURTHER ORDERED, pursuant to Sections 4(i), 4(j), 201-205, 218, 220 and 403 of the Communications Act, 47 U.S.C. §§ 154(i), 154(j), 201-205, 218, 220 and 403, that the rules set forth in the Appendix ARE ADOPTED, effective January 1, 1987.

17. IT IS FURTHER ORDERED that CC Docket No. 85-88 IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

APPENDIX

Part 69 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 69 – ACCESS CHARGES

1. The authority citation for Part 69 continues to read as follows:

AUTHORITY: §§ 4(i), 4(j), 201, 202, 203, 205, 218, 403, and 410 of the Communications Act of 1934, as amended; 47 U.S.C. §§ 154(i), 154(j), 201, 202, 203, 205, 218, 403, and 410.

2. Section 69.3(e) is amended by revising subparagraphs (3) and (4) to read as follows and by adding the following new subparagraph (8):

* * * * *

(e) * * * * *

(3) Such a tariff that cross-references an association charge for any carrier's carrier access element other than the Carrier Common Line element must cross-reference association charges for all carrier's carrier access charges other than the Carrier Common Line element;

(4) Any charge in such a tariff that is not an association charge must be computed to reflect the combined investment and expenses of all companies that participate in such a charge;

* * * * *

(8) Such a tariff shall not contain charges included in the billing and collection category.

3. Section 69.4(c) is deleted.

4. Section 69.306(b) and (e) are revised to read as follows:

* * * * *

(b) Category 1 COE (Manual Switchboards) shall be apportioned among the interexchange category and the access elements as follows. COE 1 that is used for intercept services shall be assigned to the Intercept element. COE 1 that is used for directory assistance shall be assigned to the Information element. COE 1 other than service observation boards that is not assigned to the Intercept or Information elements shall be assigned to the interexchange category. Service observation boards shall be apportioned among the interexchange category and the Intercept, Information, Common Transport and Local Switching access elements and the billing and collection category based on the remaining combined investment in COE 1 through COE 6, excluding the non traffic sensitive portion of COE 6.

* * * * *

(e) Category 4 COE (Automatic Message Recording Equipment) that is used for the duration of an interstate call that is deemed to be exchange equipment for purposes of the Modification of Final Judgment in *United States v. Western Electric Company* shall be assigned to the billing and collection category. All other COE 4 that is used for the duration of an interstate call shall be assigned to the interexchange category. Category 4 COE used only momentarily to record information about interstate switched private service traffic that is deemed to be exchange equipment for purposes of the Modification of Final Judgment in *United States v. Western Electric Company* shall be assigned to the Special Access element. All other COE 4 that is used only momentarily to record information about interstate switched private services traffic shall be assigned to the interexchange category. If a telephone company offers billing and collection services, it shall assign one-half the investment in COE 4 that is used only momentarily to record information about interstate message service to the billing and collection category and one-half of this investment to the Local Switching element. If it offers no billing and collection services, it shall asign the investment in COE 4 used only momentarily to record information about interstate message service to the Local Switching element.

* * * * *

5. Section 69.307(d) is revised to read as follows:

* * * * *

(d) Category 1C space investment (Dial Switching) shall be apportioned among the interexchange category and the Line Termination, Local Switching. Common Transport and Special Access elements and the billing and collection category. Such investment shall be apportioned in the same proportions as combined investment in COE categories 2, 3, 4, 5, 6 and 7.

* * * * *

6. Section 69.404 (a) and (b) are revised to read as follows:

§ 69.404 Traffic expenses.

(a) The Network Administration portion of Accounts 621 and 624 shall be apportioned among the interexchange category and the Intercept, Information, Common Transport, Line Termination, Local Switching and Special Access elements and the billing and collection category in the same proportions as investments in COE categories 1, 2, 3, 4, 5, 6 and 7.

(b) The Centralized Ticket Investigation portion of Account 624 should be directly assigned to the billing and collection category.

* * * * *

7. Section 69.405(c)(1)(iii), (iv) and (viii) are revised to read as follows:

* * * * *

(iii) End user service order processing, payment and collection, and billing inquiry expenses attributable to interstate private line service offered by an interexchange carrier shall be assigned to the billing and collection category.

(iv) End user service order processing, payment and collection, and billing inquiry expenses attributable to the company's own interstate message toll service, including WATS, shall be assigned to the interexchange category. End user service order processing, payment and collection, and billing inquiry expenses attributable to interstate message toll service, including WATS, offered by an interexchange carrier shall be assigned to the billing and collection category. End user payment and collection and billing inquiry expenses attributable to End User Common Line access billing shall be assigned to the Common Line element.

* * * * *

(viii) Interexchange carrier service order processing, payment and collection, and billing inquiry expenses attributable to billing and collection service shall be assigned to the billing and collection category.

* * * * *

8. Section 69.406(c) is revised to read as follows:

* * * * *

(c) All other Revenue Accounting Expenses shall be assigned to the billing and collection category.

9. Section 69.607(c) is revised to read as follows:

* * * * *

(c) The hypothetical net balance for each company shall be the sum of the hypothetical net balances for each access element. Such hypothetical net balances shall be computed in accordance with Sections 69.608-69.610.

10. Section 69.610(a) is revised to read as follows:

§ 69.610 Other hypothetical net balances.

(a) The hypothetical net balance for an access element other than a Common Line element shall be computed as provided in this section.

* * * * *

FOOTNOTES

[1] Detariffing of Billing and Collection Services, CC Docket No. 85-88, 102 FCC 2d 1150 (1986) (*Detariffing Order*).

[2] Comments in response to the petitions were filed by: the Organization for the Protection and Advancement of Small Telephone Companies (OPASTCO); American Telephone and Telegraph Company (AT&T); Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company and Pacific Northwest Bell Telephone Company (joint comments); and Granite State Telephone, Elkhart Telephone Company and Merrimack County Telephone Company (joint comments). Oppositions to the petitions were filed by the National Association of Regulatory Utility Commissioners, BellSouth Corporation, United Telephone System, Inc., Bell Atlantic Telephone Companies, Ameritech Operating Companies, SWB (opposing MCI's petition) and jointly by Pacific Bell and Nevada Bell. MCI and SWB filed replies. MCI filed further reply comments by letter dated May 30, 1986.

[3] For an explanation of the recording function, *see Detariffing Order* at n.8.

[4] *Detariffing Order* at 1175-76. We are presently considering adoption of such rules in CC Docket No. 86-111, Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities and Amendment of Part 31, Notice of Proposed Rulemaking, FCC 86-146, released Apr. 17, 1986 (*Joint Costs NPRM*).

[5] *See* Comments of OPASTCO at 2-4; Comments of Granite State Telephone, Elkhart Telephone Company and Merrimack County Telephone Company at 2-6.

[6] *See* Joint Costs NPRM at para. 100.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-27

CUBAN-AMERICAN LIMITED et al. File No. BPCT-840921KE

For Construction Permit for a New Television Station on Channel 35 Miami, Florida

ORDER

Adopted: October 24, 1986; Released: November 5, 1986

By the Commission: Commissioner Quello concurring in the result.

1. The Commission has before it: (a) an Application for Review of a Review Board Memorandum Opinion and Order, 102 FCC 2d 1238 (1985), filed January 16, 1986, by Comuni-Centre Broadcasting, Inc. (Comuni-Centre);[1] (b) an Opposition to (a) filed January 29, 1986, by Miami Broadcasting, Inc., Miami Latino Broadcasting Corp. (Miami Latino), Coral Way Broadcasting, Ltd., and Grace Broadcasting Network, Inc.; (d) Erratum and Motion to Supplement Application for Review[2] filed March 26, 1986, by Comuni-Centre; and (e) an Opposition to (d) filed April 4, 1986 by Miami Latino. The Review Board opinion at issue affirmed the dismissal of Comuni-Centre's application by the Presiding Law Judge.[3]

2. IT IS ORDERED, That, pursuant to Section 5(c) (5) of the Communications Act of 1934, as amended, and Section 1.115(g) of the Commission's Rules, the Application for Review filed January 16, 1986, by Comuni-Cemtre Broadcasting, Inc. IS DENIED.[4]

3. IT IS FURTHER ORDERED, That the Motion to Supplement Application for Review filed March 26, 1986, by Comuni-Centre Broadcasting, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

FOOTNOTES

[1] We have accepted and considered the declarations of Comuni-Centre's counsels that they did not review the timely-filed proposed findings of the other applicants before filing Comuni-Centre's late-filed proposed findings, except to the extent that they have indicated. (See footnote 1 of Comuni-Centre's Motion to Accept Proposed Findings of Fact and Conclusions filed September 23, 1985). Nevertheless, we find the Board's failure to acknowledge counsels' declarations to be harmless error and reject Comuni-Centre's contention that counsels' forbearance in this respect significantly undercuts the Board's determination that acceptance of the late-filed pleadings would have a disruptive effect on the proceeding.

[2] Since Comuni-Centre's motion is essentially a Reply to Oppositions filed against Comuni-Centre's Application for Review, it is an unauthorized pleading. See Section 1.115(f) of our Rules. Therefore, we shall deny Comuni-Centre's Motion to Supplement Application for Review.

[3] FCC 85M-3938, released October 9, 1985.

[4] See also *Hillebrand Broadcasting, Inc.*, FCC 86-426, adopted October 24, 1986.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

STAR SIGNAL CORPORATION

For a Construction Permit for a
new FM Station on Channel 286A
Aspen, Colorado

MEMORANDUM OPINION AND ORDER

Adopted: October 24, 1986 Released: November 5, 1986

By the Commission:

1. The Commission has under consideration an Application for Review filed January 21, 1986, by Star Signal Corporation ("Star") of an action by the Mass Media Bureau staff, denying Star's Petition for Reconsideration and returning the above-captioned application.

2. Star submitted its application on July 12, 1985 (the last day of the filing "window"). The application was returned by the staff on August 16, 1985, because it was found not sufficient for tender in that the applicant failed to respond to Item 8(b) of Section II, FCC Form 301, concerning Star's other broadcast interests.[1]

3. Star petitioned for reconsideration on September 16, 1985 and submitted a minor change amendment which stated that item 8(b) of Section II should be checked "No." Star contended: (1) it had substantially responded to Item 8 since it had checked "yes" to item 8(a) and fully responded to related Item 6, Section II; (2) the staff, armed with Star's answers and exhibits, would experience no difficulty beginning a multiple ownership analysis; and (3) that Appendix D to *The Report and Order* in Docket 84-750 unlawfully enlarges the basis for rejecting applications because of missing multiple-data and goes far beyond what the statement of new processing policy called for. Star's petition was denied by the staff on December 20, 1985 and the application was returned on the ground that the failure to respond fully to one of the two critical multiple ownership questions effectively prevented the staff from initiating an ownership analysis.

4. Star's amendment was also returned as untimely filed because Star failed to demonstrate that the finding of untenderability of the application as on file at the window's close (July 12, 1985) was erroneous. As was made clear in the staff's letter to Star denying reconsideration, the Commission in Docket 84-750 promulgated new FM processing procedures which, among other things, restrict the period of time within which amendments going to the tenderability of applications may be filed. *See* § 31 and Appendix D of the *Report and Order*, as well as 47 C.F.R. §§ 73.3522(a)(6) and 73.3564(a). Under the new processing procedures, applicants may perfect the tenderability of their applications and retain "window" status *only* by an amendment filed by the close of the applicable window. Therefore, to properly lie, a petition for reconsideration of a finding of untenderability and a request for *nunc pro tunc* reinstatement of the application in question must demonstrate that such finding concerning the application *as on file at the close of the window* was erroneous. *See Report and Order*, *Id.*, and 47 C.F.R. § 1.106(d)(2).

5. In its application for review, Star again acknowledges that no response to Item 8(b) was provided prior to the close of the window, but reiterates its contention that its application was "substantially complete" as defined in *James River Broadcasting Corporation v. FCC*, 399 F.2d 581 (D.C. Cir. 1968) ("*James River*"), and therefore tenderable under any reasonable standard. Star further contends that review is warranted because the Bureau action: (1) contravened existing Commission policy and precedent; (2) was arbitrary, narrow and contrary to the public interest; (3) did not consider whether the applicant had substantially complied with the FM processing guidelines since, by drawing on the application as a whole, the missing information could have been confidently and reliably derived by the staff; and (4) did not give sufficient notice to the public of the strict new processing guidelines and the disproportionately great risks caused by insignificant omissions.

6. Contrary to Star's arguments, the Bureau did not contravene existing Commission policy and precedent. The Commission, in the *Report and Order*, adopted an FM application processing standard which requires a "hard look" approach as to certain critical elements that are essential to a determination that the application is "substantially complete." In Appendix D to the *Report and Order*, the Commission stated that, henceforth, it would follow a new "substantially complete" standard for determining whether or not an application should be given a reference number and processed. The Commission did not initiate a so-called "letter perfect" standard for receiving applications for processing, as it did, for example, in adopting a "strict compliance" standard for low-power television applications. *See Low Power Television Service*, 51 RR 2d 476, 501, 502 (1982). It chose, instead, to carefully define, in Appendix D, what constitutes a substantially complete FM application under the new "window filing" procedures. Although administrative fairness requires full notice to parties whose rights may be affected by our policies, where such notice is afforded, the Commission may require strict compliance. *See Salzer v. FCC*, 778 F.2d 869, 877 (D.C. Cir. 1985) (reversed on other grounds). To meet changed circumstances, we may modify our processing standards and substantial completeness requirements as they apply to FM, so long as we do so explicitly and with good reason and provide adequate notice. *Id.* at 873; *See also Radio Athens, Inc. v. FCC*, 401 F.2d 398 (D.C. Cir. 1968). Both requisites are present here.

7. Because the processing rules which were the basis for the holding in *James River* have been dramatically changed, that case does not apply here to either the new processing rules or to "substantial completeness" thereunder. In making these changes, we articulated the following justifications for taking a "hard look" approach in instituting the tender review of applications and for redefining "substantial completeness" under this new approach: Under our previous system, many errors in key portions of the applications remained undetected until considerable processing time and effort had already been expended. Discovery of fundamental errors so far along in the processing chain resulted in significant delays both in disposing of the flawed applications and in processing problem-free but mutually exclusive applications as well as impeded the disposition of unrelated problem-free ap-

plications. Therefore, to prevent carelessly prepared, unprocessable applications from burdening the processing system, we will require applications to be substantially complete at tender or they will be returned, thereby losing their filing status. In order to assist applicants in satisfying our tender standards, we are attaching hereto as Appendix "D" a detailed list of the criteria utilized in evaluating the substantial completeness of applications The Commission believes that important benefits can be obtained from this "hard-look" approach. First, the reduction of frivolous and speculative applications will enable us to expedite the processing of applications tendered by serious candidates who are "ready, willing and able" to rapidly bring service to the public. Secondly, streamlining our processing procedures will minimize the Commission's administrative costs, enabling us to make more efficient use of our limited staff and other resources. These benefits are critical to making the window filing and "first come/first serve" process work smoothly and with minimal delay in processing large numbers of applications. *Report and Order*, 50 Fed. Reg. at 19940.

8. Arguments questioning the reasonableness of changing the processing guidelines should have been presented during the rulemaking notice and comment period or on reconsideration following the release of the *Report and Order*. In any event, that document provides abundant justification for the processing changes, as illustrated above in paragraph seven. While it is desirable to have as many qualified applicants as possible from which to select a broadcast licensee, "[w]e have recently undertaken to place greater emphasis on providing service to the public in the most efficient, expeditious manner possible. Temporizing with flawed proposals has in the past disserved the public interest by inordinately delaying the initiation of new service." *Chudy Broadcasting Corporation*, 58 RR 2d 133, 134 n. 7 (1985).

9. Star next argues that under the new policy guidelines the Commission "offered to examine applications .to determine whether information that appeared to be missing or inconsistent might be salvaged." (Application for Review, at p. 5). This is not correct. In Appendix D, the Commission specifically limited that approach to *incorrect* or *inconsistent* information. We stated, in pertinent part: [*If*] *any of the above information is missing, the application will be returned as not sufficient for tender.* If any of the above information is present but, on the face of the application, visibly incorrect or inconsistent, the application will be treated in accordance with the following guidelines. If the needed information can be derived or the discrepancy resolved, confidently and reliably, drawing on the application as a whole, such defect will not render the application not sufficient for tender. However, if the critical data cannot be derived or the inconsistency resolved within the confines of the application and with a high degree of confidence, the presence of the clearly void data will be treated as functionally equivalent to the absence of such data. In such instances, the defective application will be deemed not sufficient for tender. (Emphasis added) *Id.*, at 19946. Star's application did not involve incorrect or inconsistent information from which the Commission, "drawing on the application as a whole," might have resolved the inconsistency "with a high degree of confidence." The Star application *omitted* critical information concerning possible broadcast interests of members of the applicant's immediate family which thus made further processing of the application impossible.

10. Finally, Star claims that the Commission failed to provide sufficient notice to the public of its strict new processing guidelines. We also reject this argument. As noted above, the need for the multiple ownership information requested in Item 8 (Section II, FCC Form 301) is specifically discussed in paragraph 24 of the *Report and Order* and paragraph 3 of Appendix D, both published in the Federal Register, on May 13, 1985. Thus, applicants are charged with constructive notice of the content of that document. It is well settled that under 44 U.S.C. § 1507 publication in the Federal Register constitutes constructive notice of Commission processing requirements regardless of whether a particular applicant has no actual notice. *See M&C Broadcasting, Inc.*, FCC 85-217, Mimeo 35777 (released April 29, 1985), *citing Federal Crop Insurance v. Merrill*, 332 U.S. 380 (1947). *See also Diamond Ring Ranch, Inc. v. Morton*, 531 F.2d 1397 (10th Cir. 1976). Any applicant for a commercial FM construction permit, "should have read [that Federal Register publication] carefully and been alerted to" the multiple ownership information requirement. *Salzer v. FCC*, 778 F.2d at 876.

11. Accordingly, for the foregoing reasons, IT IS ORDERED, That the Application for Review filed by Star Signal Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

FOOTNOTES

[1] By means of the *Report and Order* in Docket 84-750, 50 Fed. Reg. 19936 (1985) ("*Report and Order*"), the Commission established as a prerequisite of tenderability or substantial completeness that broadcast applicants include, as part of their applications, responses to Items 6 and 8 of Section II, FCC Form 301. Paragraph 3 of Appendix D to the *Report and Order*, states: Items 6 and 8 of Section II, Form 301, deal with matters crucial to multiple-ownership determinations. In response to these questions, applicants are to indicate whether or not they or their relatives (immediate family) have any other pending applications or broadcast interests. If the answer to either question is affirmative, explanatory exhibits must be provided. Leaving these questions unanswered, as a practical matter, makes it impossible for the processing staff to begin a multiple-ownership analysis. In light of our expressed policy dealing with the filing of multiple applications (*see Second Report and Order* in Docket 84-231, FCC 85-124, adopted March 14, 1985 and released April 12, 1985) [57 RR 2d 1607], any failure to respond fully prevents the staff from beginning its ownership analysis and thus renders the applicant's filing not substantially complete. See also *Report and Order*, 50 Fed. Reg. at 19940.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 85-35

SATELLITE RELAY, INC. File No. 2546-CF-MP-93

For Authority to Construct and
Operate a Point-to-Point Microwave
Common Carrier Radio Station at
Evanston, Illinois

and

For Authority to Transfer File No. 171-CF-TC-(1)-83
Control from Jon W. Knudson
to Ralph E. Evans, III.

Appearances

N. Frank Wiggins, Ian D. Volner, Jerrold J. Miller and *Samuel Miller*, on behalf of Satellite Relay, Inc. and Telstar Chicago, Inc.; *Deborah Costlow* and *David L. Furth*, on behalf of Earl J. Niemoth, Jon W. Knudson and Lawrence A. Myers; *James O. Juntilla* and *Frederick F. Fitzgerald*, on behalf of the Chief, Common Carrier Bureau.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE

JOSEPH CHACHKIN

Issued: October 24, 1986 Released: November 5, 1986

Preliminary Statement

1. This proceeding concerns the application for modification of construction permit filed by Satellite Relay, Inc. (SRI) and an application for consent *nunc pro tunc* to transfer control of SRI. The SRI applications were designated for hearing by *Order*, Mimeo 2420, on the following issues:

(1) To determine the relationship between SRI and Telstar of Chicago, including their respective principals as well as any parent, subsidiary, or otherwise related companies;
(2) To determine the facts and circumstances surrounding the conception, initiation, preparation, filing and prosecution of all applications of SRI in the instant proceeding;
(3) To determine, in light of the evidence adduced above,

(a) Whether Telstar of Chicago, or any of its affiliates or principals, are real parties in interest in SRI's applications in the instant proceeding;
(b) Whether SRI or its principals have exhibited a lack of candor or intentionally misrepresented material facts to the Commission; and
(c) Whether a grant of the captioned applications would serve the public interest, convenience and necessity.

2. It was also ordered that Satellite Relay, Inc. would have the responsibility to produce evidence and that the burden of proof would be placed on SRI (Designation Order, para. 19).

3. SRI was made a party to the proceeding, as were Centel Videopath, Inc. (CVI), Midwestern Relay Company (MRC), and the Chief, Common Carrier Bureau. CVI and MRC had both filed petitions to deny SRI applications. However, CVI has taken no part in this proceeding since the Designation Order. MRC appeared at the prehearing conference but has not participated since then. Telstar Corporation was later admitted as a party.

4. A prehearing conference was held on April 25, 1985, and hearing sessions were held on September 3, 4, 5, 11 and 30, and October 1, 2, 3 and 16, 1985. All proceedings were conducted in the Commission's offices in Washington, D.C. The record was closed on October 16, 1985. Proposed findings of fact and conclusions was filed on December 16, 1985; replies were filed January 13, 1986 by SRI and Telstar. An Amicus Brief of Jon W. Knudson, Earl J. Niemoth, and Lawrence A. Myers was filed December 16, 1985.

Findings of Fact

A. The Founding of Satellite Television, Inc.

5. Satellite Television, Inc. (SatTel), was incorporated in April 1981 (Tr. 613). Its founders were Lawrence A. Myers (Myers) and Earl J. Niemoth (Niemoth) (Tr. 609). Myers has a contracting business and other enterprises (Tr. 642). He was treasurer and either president or vice-president of SatTel, as well as being on the Board of Directors (Tr. 616). Niemoth was president and a 50% shareholder of SatTel (Tr. 905). Niemoth is in the real estate business and manages condominiums (Tr. 906). SatTel was formed for the purpose of distributing movies, news and sports from Evanston, Ill., to high-rise apartment buildings along Lake Michigan on the north side of Chicago where there was no cable television (Tr. 905-06). Niemoth was the technical advisor for SatTel, while Myers was to do marketing (Tr. 614). SatTel investigated means of getting the signals to the buildings without success until Niemoth thought of using a microwave technique (Tr. 906-07). After investigating various possibilities without success, Niemoth contacted Mark Tauber (Tauber), an attorney who practiced before the Commission (Tr. 907-08). This was in early May 1981 (CCB Ex. 57).

6. As a result of this contact James Smith (Smith), an associate of Tauber, researched the legal issues and concluded that SatTel would have to deliver its programs through a common carrier (CCB Ex. 58, p. 3). He also found that the Commission had a policy requiring that the program originator be unrelated to the carrier (*ibid*p. 4). That memo was dated May 20, 1981. Tauber stated that he suggested that Niemoth contact existing carriers and some three weeks later Niemoth called to say he had talked to the carriers and thought their prices were exorbitant (Tr. 55). Niemoth then suggested the formation of a new carrier (Tr. 56). Tauber had more research done on Commission policy concerning market entry and concluded that the Commission would not restrict such entry (*ibid*). No memorandum reflecting that research appears to have survived.

7. Tauber recalled that he told Niemoth that Niemoth could not be an owner, officer or director of the carrier, nor could he control it (Tr. 60). He said that Niemoth was reluctant and wanted to buy the carrier (*ibid*). Smith remembered telling Niemoth that a relative of Niemoth could not be in control of the carrier (Tr. 1540).

8. At some point that summer Niemoth brought the situation to the attention of a former high-school classmate, Jon W. Knudson (Knudson) (Tr. 909). Knudson is an attorney in Chicago in the general practice of law (Tr. 1046). Niemoth said that Knudson was a friend of 25 years, had represented him in litigation, and had invested with him in real estate (Tr. 909). Knudson, however, recalled that they had been high-school classmates, graduating in 1960, but had few contacts thereafter until he represented Niemoth in 1979-80 (Tr. 1047-49). He denied any business association (Tr. 1047). Myers had had no dealings with Knudson (Tr. 614). Niemoth and Knudson asserted that Knudson was eager to become the carrier (Tr. 909-10, 1052-54). It appears that Knudson had no clear idea what the venture would cost him (Tr. 1050). He expected that SatTel would finance the equipment and he (SRI) would lease it back (Tr. 1051). He talked to Tauber who told him that there could be no common officers and directors between SRI and SatTel (Tr. 1062). Knudson, according to Niemoth, told Niemoth to do the engineering and file the papers (Tr. 910-11).

9. On June 18, 1981, Smith wrote a letter to Niemoth (CCB Ex. 59) which stated, first sentence, "As promised we are enclosing for your review: (1) FCC Forms 430 and 435, which must be filed as part of your application to provide a microwave common carrier service; . . . ." From the record, it is impossible to state whether Knudson had been identified as the common carrier principal at that date.

10. On August 10, 1981, Smith wrote to Niemoth again, this time giving detailed instructions on filling out FCC Forms 435 and 430 (CCB Ex. 60). He specifically alerted Niemoth to answer all Form 435 questions, ". . . with your common carrier hat on." The letter follows a conversation between Niemoth, Tauber and Smith (para. 3) and has no mention of Knudson. Although Smith on cross examination asserted that he sent it to Niemoth as the chief engineer (Tr. 1553) and customer of SRI (Tr. 1557), he included information on SRI's rate schedule (CCB Ex. 60 p. 2, item 30). Smith opined on cross-examination (Tr. 1545, 1593) that some letters to Niemoth may have been "blind copied," or "BCC'd" to Knudson. CCB Exs. 60, 66 and 68 show "bcc Mark J. Tauber" or variations thereof, but no "bcc" to Knudson.

11. On August 18, 1981, SRI was incorporated (CCB Ex. 2 at its Ex. 11). The incorporator was Earl J. Niemoth. The registered agent was Earl J. Niemoth (*ibid* p. 1 of Ex. 11). Niemoth paid the incorporation fees (Tr. 999).

12. On September 18, 1981, Tauber wrote to Niemoth, enclosing his firm's August invoice which reflected charges regarding ". . . your 430 and 435 application; . . . ." (CCB Ex. 61) FCC Form 435 is the application form for a common carrier microwave construction permit (CCB Ex. 1). it contains both technical and nontechnical questions. FCC Form 430 is the licensee qualification report (CCB Ex. 2). It is exclusively nontechnical. Niemoth and Myers paid all legal expenses of SRI (Tr. 999).

13. On September 28, 1981, Niemoth, Myers and Knudson entered into a "Memorandum of Agreement" (CCB Ex. 19). (The memorandum was apparently signed on October 7, 1981, *ibid* p. 2). Niemoth was to be chief engineer to SRI, and Knudson was to "cooperate" in granting SatTel a lease for eight channels on SRI's prospective system (*ibid* para. 4). Knudson also granted Niemoth and Myers an option to purchase SRI (*ibid*para. 5). The consideration for granting the option was payment of $50 per month to Knudson by Niemoth and Myers (*ibid* para. 8). As further consideration Niemoth and Myers agreed to reimburse knudson for all expenses incurred in connection with the SRI application (*ibid* para. 9). The purchase price for SRI, on exercise of the option, was to be 1% of the purchase price of SatTel, if Niemoth and Myers had sold SatTel, or $1,000 if SatTel had been dissolved (*ibid* para. 10). It was to be understood that Niemoth and Myers could not exercise the option so long as they, or either of them, had an interest in SatTel, unless the FCC allowed joint ownership of carrier facilities and programming (*ibid* para. 11).

14. Tauber gave contemporaneous approval of this option agreement, since he believed that para. 11 made it legitimate (Tr. 62-63). Smith was not informed of it (Tr. 73). Knudson asserted that the option agreement gave him some assurance that he would receive some money if Niemoth and Myers did not perform as they had said they would (Tr. 1069). However, the agreement makes no provision for payment to Knudson if SatTel went out of business (Tr. 1082). Myers had nothing (Tr. 925) to do with the document, and could not recall any discussions about it (Tr. 619-20). Niemoth stated the provision permitting exercise of the option under specified conditions was a business decision intended to give Myers and him some flexibility (Tr. 926). Niemoth also did not think that para. 4 bound SatTel to lease eight channels (Tr. 999-1000). SatTel paid all of SRI's expenses, some $33,000 (Tr. 1000).

15. On December 24, 1981, Niemoth sent Tauber, ". . . the original, prepared and signed by my president of Satellite Relay, Inc., forms 430 and 435." (CCB Ex. 62). On the 28th Niemoth wrote again, stating, "Enclosing is the prepared Form 430. You will note that I have left Paragraph 2 blank at this time. Fill it in as required." (CCB Ex. 63). As noted above, Form 430 is the licensee qualification report.

16. On January 15, 1982, Smith returned the Form 435 to Niemoth with detailed instructions for revisions (CCB Ex. 64). He included directions for Niemoth to review Ex. T (tariff) and Ex. U (financial ability). Ex. U-1 is a monthly cash flow for SRI.

17. Later that month, January 29, Smith wrote Niemoth again, this time concerning MDS (Multipoint Distribution Service). He told Niemoth (CCB Ex. 65, p. 2, 2nd full para.), ". . . the good news is that the procedure is almost exactly the same as the one you have followed for your point-to-point microwave application. . . ." Later (p. 3) Smith told Niemoth, ". . . your MDS application would be nearly identical to your point-to-point application."

18. As the exhibits above indicate, all letters and forms were sent to or from Niemoth. Tauber testified he had no letters to or from Knudson (Tr. 698-98). Niemoth was the engineer for SRI (Tr. 902, CCB Ex. 1, Item 19). Knudson testified that the Illinois Bar prohibited running a separate business from a law office (Tr. 1144). No one else testified to any such restriction.

19. knudson had no out-of-pocket expenses (Tr. 1096-98) and did not pay for his SRI stock (Tr. 1172). The correspondence was typed by Niemoth's office, which was also the SRI office (Tr. 1182). SatTel (CCB Ex. 51, Tr. 1026) and later Telstar (CCB Ex. 28, Tr. 544-46) filed SRI's tax returns. SRI did not have a checking account (Tr. 1174). In addition, there are no minutes of meetings reflecting the election of Knudson as President or the election of other officers or directors (Tr. 191-192, 194-195, 208, 219). The only corporate record of SRI appears to be a stock certificate issued to Knudson and signed by him at the closing held on November 15, 1982. At that time, discussed more fully *infra*, Niemoth and Myers sold their stock in Sat Tel to Satellite Transponder Network and Knudson signed a "Consent to Assignment" of the option to purchase the shares of SRI. Knudson left the certificate at the closing and never asked for its return (Tr. 1166).

B. The Applications and the Processing

20. The SRI application was submitted on February 1, 1982 (CCB Ex. 1). Besides the required technical information, it showed Niemoth as the person responsible for the technical operation (Item 19), and that the facilities would be owned by SatTel with SRI leasing them (Ex. Q). Ex. Q was in response to Item 26(b), which requests ". . . in any agreements or understandings existent or under negotiation which affect the ownership or control of the facilities proposed herein, or any right or interest therein by any person not party to this application." There was no mention of the option (CCB Ex. 19). Tauber was aware of Section 21.13 of the Commission's Rules requiring disclosure of a real party in interest, and considered it, but decided not to disclose the option (Tr. 733). Tauber considered it unnecessary to do so since it did not involve ownership (Tr. 1040).

21. At the same time, SRI filed its FCC Form 430 (CCB Ex. 2). The Articles of Incorporation show Niemoth as incorporator and registered agent (p. 1 of Ex. 11 to CCB Ex. 2). Niemoth testified that Knudson told him to file the papers (Tr. 911), including the Form 430 (Tr. 922). Knudson initially testified that he participated in the preparation of the application (Form 435). However, when shown a copy of the Form 435 filed by SRI Knudson was unable to identify a single question which he personally answered and conceded that his only role was his signing of the completed form (Tr. 1084-1089). Knudson also claimed that Niemoth had no role in the non-engineering sections (Tr. 1089-90). However, according to Niemoth, Knudson wanted him to fill out all documents pertinent to SRI whether it pertained to engineering or not (Tr. 992, 1042). Niemoth asserted he assumed this role because Knudson had no prior experience in FCC matters. However, Niemoth also had no experience in filling out common carrier applications and retained Tauber because of such lack of experience (Tr. 1044).

22. On April 13, 1982, the Bureau wrote to SRI, sending a copy to Smith, requesting further information (CCB Ex. 3). The requests were:

(a) a copy of the agreement (Ownership and Control of Facilities) referred to in exhibit Q;

(b) a copy of the tariff referred to in exhibit T;

(c) an explanation of the apparent affiliation between the proposed common carrier (Satellite Relay, Inc.) and the customer/programmer. Such an arrangement appears to be contrary to the requirements of Section 21.700 of our Rules and Regulations;

(d) a showing that the eight (8) channels will be used (providing service) for a minimum of 240 hours per month (30 hours per individual channel).

23. Smith sent Niemoth a draft reply on April 15, 1982 (Telstar Ex. 2). He enclosed a proposed SRI tariff and a contract between SatTel and SRI. Tauber agreed that no changes were made by Knudson or Niemoth (Tr. 78). Niemoth testified that he and Knudson spent an hour on the response (Tr. 949), and Knudson told him to get the information (Tr. 945).

24. The SRI response was submitted on April 22, 1982 (CCB Ex. 4). It included an agreement between SRI and SatTel (CCB Ex 4, Attachment 1) whereby SatTel would construct the station and SRI would lease it. SatTel would lease at least four channels at a payment of $662.50 a month per channel. SatTel would own the equipment with SRI having an option to buy. SRI would be responsible for station maintenance and insurance. SRI was to lease the station for $1,000 a month and pay utilities. Attachment 2 to CCB Ex. 4 was a draft tariff with no effective date, including (p. 16 of tariff) the price of $662.50 per month per channel. Tauber said that Knudson informed him of the charge of $662.50 (Tr. 83).

25. In response to item (c) of CCB Ex. 3, SRI emphasized its lack of affiliation to SatTel or Niemoth by stating:

> Mr. Niemoth has performed no function on behalf of SRI since its incorporation in August, 1981, is not an officer, director or shareholder of SRI, and has no relationship to SRI other than as president of the initial subscriber to its microwave station.

Tauber testified that he only considered ownership or control as constituting a "relationship" and not the option (Tr. 80). He also said that he believed Niemoth had only done engineering portions (Tr. 720- 21). He granted his firm may have used loose language in its correspondence to Niemoth (Tr. 715). Niemoth did not think he had performed any function for SRI, although he had developed costs (Tr. 966). Nor did he think that filling out forms and paying all bills was a "function" (Tr. 1005-07). He did not think that the option constituted a "relationship" (Tr. 1013). Knudson did not see the actual reply (CC Ex. 4) until after it was filed (Tr. 1124). However, he thought it was correct that Niemoth had performed no function (Tr. 1146). He did not believe that paying bills, filling out forms and handling mail constituted a relationship (Tr.1196). He said that there was no discussion of revealing the option (Tr. 1197).

26. On May 20, 1982, SRI's application was granted and SRI received a construction permit (CCB Ex. 5; CCB Ex. 23, p. 73). Smith sent it to Niemoth and asked him to review the SRI tariff and indicate any changes Niemoth wanted. He concluded by promising to send a license application to be signed by Knudson (CCB Ex. 20). (Smith had previously informed Niemoth by telephone with a follow-up letter, CCB Ex. 67). He believed he had told Knudson by telephone, Tr. 1594, but apparently did not send a letter. Smith also sent Niemoth FCC Forms 702 (assignment) and 704 (transfer of control) on July 29, 1982, at Tauber's request (CCB Ex. 68). To Tauber's knowledge, Niemoth had no licenses (or construction

permits) at that time (Tr. 737). Niemoth testified that neither he nor SatTel had anything to assign or transfer at that time (Tr. 720-22).

C. The Grant of the Construction Permit to the Sale of SatTel.

27. About June 1982, Knudson was told that Niemoth and Myers intended to sell SatTel (Tr. 1198). Myers testified that he and Niemoth had found that their proposed undertaking was a more capital intensive business than they had expected and that they could not get software (programming) (Tr. 633). He recalled that at the time of the sale of SatTel the company had no software licenses (Tr. 634). His recollection was that Skycom introduced them to Joseph Corazzi, President of Telstar Corporation (Tr. 633-34). Corazzi said that he had known Myers since the 1970's (Tr. 1214). At all events he met Niemoth and Myers in the summer of 1982, and they described their system (Tr. 1215-17). To Corazzi, SatTel had assets of a valuable customer base (i.e., a contract to provide signals to five buildings) and a microwave path (the agreement with SRI) (Tr. 1217-1).

28. Telstar Corporation is a Nevada corporation founded in 1981 by Gerald A. Bartell and Joseph A. Corazzi to engage in the business or delivering television programming by means of satellite (CCB Ex. 54, p. 2). It has utilization rights to five AT&T satellite transponders with portions subleased *(ibid)*. It delivers Showtime, the Playboy channel, ESPN and other entertainment (*ibid*).

29. Negotiations between the companies had difficulties (Telstar Ex. 4); but, as they proceeded, Telstar hired Ralph E. Evans III to study the SatTel operation (Tr. 139-40). Evans was and is a consulting engineer who had done work for Telstar before (*ibid*). Evans found that no SRI system existed and that no equipment had been ordered (Tr. 141-42). His dealings were entirely with Niemoth, and he did not meet Knudson (Tr. 143-46). He believed that Knudson was only an accomodation party for Niemoth (Tr. 371). Corazzi also testified that Knudson took no part in negotiations (Tr. 1260).

30. Evans submitted an engineering analysis to Telstar, but it has not been located (Tr. 151). Evans thought that changes in the system were needed, as will be discussed below.

31. In negotiations for the sale of SatTel, Niemoth never discussed a sale without including the option (Tr. 9079-80), nor did Corazzi (Tr. 1249). Corazzi knew that Telstar would have to have microwave but considered the customer base SatTel's most valuable asset (Tr. 1246-47).

32. On November 15, 1982, a stock purchase agreement was signed between Satellite Transponder Network (STN) (a subsidiary of Telstar located in Albuquerque, New Mexico), and Myers and Niemoth (CCB Ex. 22). Tauber provided Frank Siepker, a Chicago attorney representing Niemoth and Myers, with a written opinion that SRI was not in violation of any regulation (CCB Exs. 69, Tr.740).

33. Under the agreement, Niemoth and Myers would transfer to STN their shares in SatTel for $250,000 as well as $6,000 for each additional receive site obtained by STN within five years (up to maximum of $750,000) (*ibid*, pp. 16-18). On the same date, Niemoth and Myers assigned to STN's named designee their option to purchase the shares of SRI (CCB Ex. 11, Assignment and Consent to Assignment). STN's named designee agreed to assume the obligation to pay Knudson $50 per month until the month in which the option was exercised (*ibid*, Article Two). Attached to the document was the "Consent to Assignment" (CCB Ex. 11, p. 15 of the Assignment and Consent to Assignment) whereby Knudson consented to the assignment of the option.

34. Niemoth testified that there was no breakdown of how much consideration was attached to each asset transferred to STN, nor was this discussed in the negotiations (T. 1025). He said that SatTel's assets were its transmitter and receive site leases, both taken over by STN, and its contract to deliver programming to apartments (Tr. 1022, 1024). SatTel had no hardware, and no written contracts for programming, although Niemoth thought that Myers had understandings for programs (Tr. 1023). Myers said that Niemoth handled the negotiations for the sale (Tr. 631) and identified SatTel's assets as the contract with SRI and the lease with the apartments (Tr. 634-36). He could not recall if he attended the closing but remembers receiving a check (Tr. 637). He estimated his monetary investment in SatTel as $10-20,000, plus 1% of his time (Tr. 624-44). He said that under the contingency agreement he could receive more than his $125,000 share, but had not, and did not care about the additional money (Tr. 645-46). Knudson said that he assigned his option because he was paid for it (Tr. 1200-01). Knudson received $2500 for consenting to the assignment of the option (Tr. 933). He had not tried to find another subscriber for SRI (Tr. 1205).

35. With the sale of SatTel the role of Niemoth and Myers declined and almost vanished. Niemoth testified that in June 1983 he heard that Telstar of Chicago, Inc. (TCI, successor to STN) intended to exercise the option, and that he spoke with Bernard L. Robinson, an officer of Telstar. He told Robinson that FCC approval of an assignment was needed, but Robinson assured him that everything was all right (Tr. 984-85). Myers' only involvement was periodic inquiries about the operation's status (Tr. 646-48).

36. Following the closing Knudson ceased any involvement with SRI. Robinson stated Knudson's attitude was that "he didn't want any part of this whole thing" and as far as Knudson was concerned, once he assigned the option, SRI was no longer a concern of his (Tr. 575). Knudson's activities in connection with SRI following the November 15, 1982 closing consisted of an exchange of letters in August 1983 in connection with Evans' designation as the holder of the option and Evans' exercise of the option to purchase SRI's stock (CCB Ex. 39, 40b); and an exchange of letters with Telstar Corporation in connection with tax returns for SRI prepared by Telstar Corporation (CCB Exs. 28, 29). In this connection, Knudson asserted that following the closing, he was of the opinion that he was going to be replaced imminently as President of SRI and when he heard nothing further, he assumed it was true (Tr. 1162-63). Corazzi never spoke to Knudson after the closing and never directed anyone else to contact him (Tr. 1294). Evans also had no contacts with Knudson (Tr. 170). Corazzi never considered working out a plan whereby Knudson would continue as head of SRI and based on his conversations with Niemoth and Myers, he understood Knudson didn't want to continue there (Tr. 1255-56).

D. The Sale of SatTel to May 1984.

37. After the sale of SatTel, Telstar had a Chicago operation which was run by Gordon Whitehead, an officer of Telstar, with Rene Miller in charge of marketing and "facilitating" (Tr. 1245). SRI had enough capacity for Telstar's proposed uses, but Evans thought of additional

ways of using SRI's frequencies, and Telstar changed its concept about February or March 1983 (Tr. 1250-51). Corazzi did not want to start with the initial usage and then add new services (Tr. 1253). Niemoth had believed that one microwave path would be sufficient, but Evans wanted five (Tr. 257). He also wanted to add AM equipment; and, if a modification of construction permit were granted by the Commission, SRI would have 48 channels (Tr. 259, 272, 308 and 311, Statement Regarding Use of Hughes AML Transmitter, CCB Ex. 6). Evans' preparations included a trip to California to visit Hughes Aircraft Company which he billed to Telstar (CCB Ex. 56, p. 18). CCB Ex. 26, an update memo to Corazzi from Rene Miller, shows a report that "everyone" in Chicago agreed that the Hughes proposal was the best (ibid, p. 3, para. 6) and ended with a recommendation that they secure the necessary FCC license for the (Hughes) AML system (ibid, p. 6, para. 3).Telstar was urging Evans to set goals and put the system into operation (CCB Ex. 25, Tr. 433). Robinson described this period, from November 1982 into February 1983, as one of a hiatus in the office while Evans worked in the field (Tr. 581).

38. During this same time, the financial agreements between SRI and Telstar changed from the earlier ones between SRI and SatTel. Evans was not familiar with the service contract contained as an amendment to the construction permit application (CCB Ex. 4, Attachment 1) but would not have followed it in any event (Tr 328-29). With the new proposal by Evans, start-up costs would be substantial (Tr. 323). The AM equipment would cost about $250,000 (Tr. 324). Evans believed Telstar should provide him with $30,000 and $1,950 a month for service when service started (Tr. 323-24). However, Telstar was also to pay Evans $1,950 a month before service started (Tr. 325). This $1,950 was to go toward the $30,000 up-front costs (Tr. 340). Evans would lease the AM equipment from Telstar, but the amount of the lease was not (and has not been) determined (Tr. 340-41). Evans said that Gordon Whitehead agreed to the $30,000 up front (Tr. 1502). Corazzi said he (Corazzi) would not have been involved in details (Tr. 1232) but agreed that someone had approved payment and Whitehead had authority (Tr. 1301-32). Moreover, he was never sure what Evans would eventually have to offer Telstar (Tr. 1233). Evans confirmed that, in his mind, the agreement kept changing with different circumstances (Tr. 1503-04). Corazzi said that Telstar would pay some of Evans' start-up costs (Tr. 1233). Evans did not intend to bill Telstar for all expenses, but only five-eighths, since they were to have five channels (Tr. 322-33). CCB Ex. 56 shows Evans billing Telstar a monthly retainer of $21,900 for March, April and May 1983 (*ibid*, pp. 13, 11 and 2 - the invoice for May is unavailable according to ** p. 2).

39. During the time the engineering proposal and financial agreements were being developed, the question of the option was being worked out. Corazzi wanted to choose Evans as designee, but Gerald Bartell, Chairman of the Telstar Board, was hesitant because Evans was his nephew (Tr. 1226-27). Corazzi wanted Evans to head SRI because he was an electrical engineer and familiar with FCC technical rules. Also, Evans was someone they could rely on (Tr. 498, 558, 571, 1255, 1278). Evans himself said he first heard of the option in early 1983 (Tr. 157, 172) or late 1982 (Tr. 419). Evans had doubts whether he could be the designee (Tr. 161), and Robinson called Ian Volner, a communications lawyer, and asked if it were permissible, considering the family relationship. Volner said there was no prohibition (CCB Ex. 55, para. 7). Volner's records indicate he communicated with Telstar concerning the Chicago microwave project only on November 28 and 29, 1982, before September 1983 (CCB Ex. 71, paras. 3 and 4). Robinson believed he received the opinion in March 1983 (CCB Ex. 55, para. 7). He said that he signed the "Designation" (CCB Ex. 40, p. 4) on March 15, 1983, and the Volner opinion would have been no more than 30 days before that (Tr. 502). He also noted that SatTel changed its name to Telstar Chicago, Inc. on February 5 1983 (CCB Ex. 23 p. 19), and thought the Volner opinion may have been around then (Tr. 563). Corazzi also thought that the choice of Evans was in the January - March period (Tr. 1228). He would not deny that Volner might have given his opinion in November, but still thought of January or February (Tr. 1327-29). Evans had no clear recollection of when he was told he would be the designee (Tr. 1529-30).

40. There is also doubt of when Evans was actually designated. Robinson relied on the "Designation" dated March 15, 1983 (CCB Ex. 40, p. 4). Corazzi also thought Evans had been named about March (Tr. 1305) although he had not seen the "Designation" (Tr. 1318), nor could he recall anyone telling him of the "Designation" at that time (Tr. 1326). Evans himself could not remember when he first saw the "Designation" (Tr. 205). He stated he first saw it in August 1983 (Tr. 424), but granted he could have seen it before then (Tr. 1411 and 1417), but thought he probably had not (Tr. 1418).

E. The Modification Application, Petition to Deny and Opposition.

41. In order to make the engineering changes considered necessary, Evans had been working on a modification-of-permit application (Tr. 272, 384). He considered himself, at that time, as a consulting engineer for Telstar (CCB Exs. 31, 32; Tr. 294-297). Evans chose the law firm of Miller b Fields to assist him in the filing of the application. Evans discussed the retention of Miller & Fields with Robinson . Telstar officials initially objected, preferring the use of Cohn & Marks, Telstar's attorneys. However, they subsequently agreed with Evans that retaining a separate firm for SRI would be better (Tr. 410-15). Evans did not discuss the choice of counsel with Knudson (Tr. 412). Miller & Fields had not previously represented Evans or SRI (Tr. 752). However, the firm had worked with Evans and his father in connection with applications in which the Evans firm had been hired as consulting engineers (Tr. 751).

42. On May 25, 1983, Evans sent 5 original sets of the modification application to Miller & Fields. The transmittal letter from Evans requested that the firm obtain the necessary data to complete exhibits "T" and "U". Evans also added a P.S., "Please insert signature sheet received from Albuquerque on page 8 of the attached form" (CCB Ex. 30). Albuquerque is the Telstar headquarters. Evans gave the TCI Chicago address in Item 1 of FCC Form 435 and put "Attn.:" Renee Miller (CCB Ex. 6). Miller was Evans' contact with TCI (Tr. 1437). SRI had no Chicago office (Tr. 1440).

43. The material sent by Evans was turned over to Fields for consideration (Tr. 747). Shortly after receiving the documents, Fields contacted Evans to discuss the gathering of the information required to complete the application and getting it signed (Tr. 755). His understanding of the conversation with Evans was that Evans had recently acquired a stock ownership in SRI and was

president of SRI (Tr. 754). Fields also recalls talking to Tauber and other lawyers in trying to get information about the history and status of SRI's construction permit. Fields recalls that Tauber stated that Knudson had owned SRI but had no information about later events (Tr. 768). He also recalled being told that TCI had an ownership interest or an option to acquire an ownership interest in SRI (TR. 774-75). Fields did not check documents on file with the Commission to determine whether Evans was listed as owner of SRI (Tr. 759). In addition, Fields did not change any answers or inquire as to answers to questions on the application. He understood his responsibility was to put together the application which was already prepared, obtain the additional information and file it (Tr. 807, 809). He asserted that Evans was primarily responsible for preparing the application (Tr. 809). Evans did not ask him to review the material filed (Tr. 811).

44. Fields obtained Ex. "T" to the application from one of the attorneys previously doing work for SRI (Tr. 803). Ex. "T""Tariff FCC No. 1" was the same as the one previously filed (CCB Ex. 4) although Evans claimed he did not intend to rely on it (Tr. 369). Ex. "U", signed by Robinson, confirmed an agreement by Telstar of Chicago to construct and lease the facilities at a cost not to exceed $225,000. After obtaining the exhibits, Fields combined the five original sets of applications sent by Evans into one application and sent it back to Evans (Tr. 794-75). Fields stated that the certification page (CCB Ex. 6, p. 29) shows Evans as President of SRI because Evans told him he held that position (Tr. 778, 783). Fields said he never received signature sheets from Albuquerque (Tr. 792).

45. Item 26 of the application filed with the Commission lists Evans as owner of the facilities. Item 26(b) which asks for agreements or understandings existent or under negotiations which affect the ownership or control of the proposed facilities is answered in the negative. Evans conceded the response was wrong (Tr. 354). He stated he was confused as to the proper response. He stated that when he initially went through the form, it was filled out as though the existing licensee would send it in and he responded in the affirmative. However, according to Evans, he changed his answer to "no" when he was told to sign as president of SRI (TR. 350-52). Evans agreed that at the time he signed the application as president, he had not exercised the option to acquire SRI's stock and he was not an officer of SRI (Tr. 352). He asserted, however, that his response to Item 26(b) was consistent with his signing the application as President since there were no negotiations at that time to change his interest in SRI. He said his negative response was not an attempt to hide information from the Commission (Tr. 352-54).

46. At some time before May 25 and June 2, Evans testified that Robinson told him to sign the application as president (Tr. 159, 1395, 1397). Evans recalled Robinson saying it was the proper thing to do. Evans claims he also believed at the time his action was proper (Tr. 1397-98) but now believes it was not proper to sign as president of SRI (Tr. 390). Evans signed the application as president. Evans testified he had a subsequent conversation with Robinson or Whitehead in which he was told that steps would be taken to affirm his prior actions on behalf of SRI (Tr. 1397-99). Robinson denied instructing Evans to sign as president (Tr. 506). Robinson said that "affirmation of prior actions" was a term of art used frequently in corporate law. A board of directors would then ratify actions taken by corporate officers between board meetings (Tr. 600).

47. On July 29 and August 1, 1983, Petitions to Deny the SRI application were filed by CVI and MRC, questioning among other things the change from Knudson to Evans as owner and president, whether SRI was a phantom carrier, the role of Earl Niemoth in the previous application and of TCI as successor to SatTel (CCB Exs. 7 and 8).

48. On August 1, 1983, upon receipt of the pleading Fields wrote a letter to both Robinson and Evans, enclosing the CVI petition (CCB Ex. 36). He requested an affidavit from Evans covering engineering questions, and an affidavit drafted or arranged by Robinson to cover such questions as the then current president of SRI and the filing of a correct Form 430. Fields does not recall any phone calls to Evans or Robinson in preparing the opposition to the petition (Tr. 819). Robinson, however, said he called or had a call from Mark Fields (Tr. 507, 510, 512). This call (or these calls) preceded his letters of August 2, 1983, to Fields (CCB Ex. 37), Jeffrey A. Bartell (CCB Ex. 38), Knudson (CCB Ex. 39), and Evans (CCB Ex. 40) (Tr. 513-14). Evans recalled that Fields called him and said that FCC records showed Knudson as SRI president (Tr. 1408-09).

49. Robinson, as indicated above, sent at least four letters on August 2, the first of which (taken in order solely by exhibit number) was to Mark Fields (CCB Ex. 37). The letter, sent via Federal Express, as were all four, enclosed Telstar copies of materials on Telstar Chicago, SRI and the "Designation." It also stated that Evans had exercised his option, and that a directors' and shareholders' meeting, held that day, elected Evans president and confirmed his actions in applying for modification. Robinson could not explain how a directors' and shareholders' meeting convoked by Evans could elect Evans president before Evans acquired the SRI stock (Tr. 584-88). Shortly after receiving Robison's letter, Fields checked SRI's station files for the first time. Fields then called Robinson and Hultquist and informed them that Commission files reflected that Knudson was sole shareholder and president of SRI and that there were no Forms 430 or amendments showing Evans as shareholder and president of SRI (Tr. 849-51). Fields stated that he learned for the first time from Robinson's letter of the existence of the option and Evans' exercise of the option to acquire SRI (Tr. 838-39, 853, 858-59). After reviewing Commission records and Robinson's letter, Fields was of the view that exercise of the option required prior Commission consent and if it had occurred, the parties should seek "retroactive consent" to such a transaction (Tr. 858). Fields told Robinson and Hultquist that it was necessary to file an application for consent to transfer of control (Tr. 851). Fields also recalled a conversation with Evans in which he told him of what the Commission's files reflected. Fields initially stated his conversation with Evans was in August 1983. In response to further questions, Fields stated he had had a number of conversations with Evans in 1983 and could not pinpoint the date of that particular conversation (Tr. 856). Evans' recollection was that Fields called him and told him that the FCC records showed Knudson as president (Tr. 185-186, 1408-09). Evans stated that, after Fields told him that the 430 showed Knudson as owner of SRI, they discussed filing a form with the Commission to "indicate the transfer of control"

(Tr. 1432). Evans believed this conversation took place before his sending a letter to Knudson on August 5 exercising his option to acquire SRI's stock (Tr. 1432-33).

50. Robinson also wrote to Jeffrey Bartell on August 2, 1983, enclosing documents (CCB Ex. 38). Jeffrey Bartell was a Wisconsin attorney, son of Gerald Bartell, Telstar's chairman of the Board, and he sometimes represented Telstar (Tr. 485). Robinson also asked Jeffrey Bartell to help Evans get SRI squared away. Robinson testified that he sent draft minutes to Jeffrey Bartell at the latter's request (Tr. 515).

51. The third letter written by Robinson was to knudson, sending a copy of the "Designation" and saying that Robinson understood that Evans planned to exercise the option immediately (CCB Ex. 39).

52. The fourth letter Robinson wrote on August 2 was to Evans (CCB Ex. 40). This letter, which among other things, named Evans as the designee to purchase SRI's stock, elected Evans president and a direct of SRI, and confirmed and ratified the actions taken by Evans as president in filing an application to modify SRI's construction permit, enclosed (1) minutes of a shareholders' and directors' meeting of SRI, (2) the "Designation," and (3) a check for $2,950. Robinson instructed Evans and his mother to sign the minutes and send copies to Fields (by Federal Express), and also to Jeffrey Bartell and Robinson. He also told Evans to send *his* (emphasis in original) check to Knudson with a letter saying that Evans was exercising his option and requesting the corporate shares and books. CCB Ex. 40A shows that the check for $2,950 was listed on Telstar's books as a loan to Evans. As indicated above, Robinson said he prepared the minutes at Jeffrey Bartell's request (para. 50). According to Robinson, he heard that Evans had signed as president of SRI and so urged Evans to make himself president (Tr. 503-04). He stated that he may have heard from Fields that Evans had signed as president (Tr. 505). He later was more sure that he only learned of Evans signing as president from Fields' call (Tr. 512). He called Evans and expected that Evans would hold the meeting and send a check on August 1 (Tr. 521). The payment of $2,950 to Evans was approved by Corazzi (Tr. 520). Robinson never saw any loan instrument (Tr. 518). Robinson believed that Evans could accomplish the transfer on the same day (Tr. 584-588) since SRI was a small corporation (Tr. 585).

53. Evans doubted that he had ever seen the "Designation" until he received Robinson's letter of August 2. Evans was by now uncomfortable with Robinson's talk of "affirming previous actions," but he did as Robinson told him to (Tr. 1419). Evans did hold a director/shareholder meeting with his mother and told Robinson of it (Tr. 204-05). Evans received the check from Robinson but did not receive the stub showing it as a loan and treated the check as a payment on Telstar's balance (Tr. 210, 1447). He sent his own check to Knudson on August 5, 1983 (CCB Ex. B).

54. The amount of $2,950 for exercise of the option was computed by Robinson (Tr. 502), but he told Evans to establish the correct amount any way he wished (Tr. 503). The $50 a month to Knudson, provided for in the option (CCB Ex. 19), was included in the amount (Tr. 583), but no "reimbursement" was, since either Knudson or Siepker said there was none required *(ibid)*. Robinson talked to Knudson by phone that summer regarding the SRI books (Tr. 603). (Knudson said he did not have them (Tr. 604)). Evans had one phone conversation with Knudson concerning the price for SRI (Tr. 157-58, 173). He recalled that Niemoth told him the price (Tr. 173). knudson received and cashed the check (Tr. 1154).

55. On August 29, 1983, Knudson wrote to Evans and acknowledged receipt of the letter and payment from Evans (CCB Ex. 42). He stated that he believed he assigned the stock on November 15, 1982, but said that, if he was mistaken, ". . . this is your authority to effect an assignment and delivery." *(Ibid,*para. 2). Evans remembered discussing the letter with Jeffrey Bartell in an effort to find the stock (Tr. 1451), but would not have discussed it with Fields since Fields would not have had the stock (Tr. 1452).

56. While these activities were going on, Fields was preparing the Consolidated Opposition to the petitions (CCB Ex. 9). Fields talked to Hultquist, a Chicago attorney, Who provided an affidavit (Attachment C to CCB Ex. 9), stating that he was the registered agent and Chicago attorney for SRI, that all the stock of SRI had been acquired by Evans on August 5, 1983, and that Evans was the sole shareholder. Hultquist did not tell Fields the basis for his belief (Tr. 824-25), and in fact Fields could not recall discussing ownership of SRI with Hultquist (Tr. 828). Fields said that from August 1 to 31 he did not try to obtain oral confirmation that Evans acquired ownership in or before May 1983 (Tr. 834-35). Fields knew that exercise of the option required Commission consent (Tr. 857-58) but did not prepare an application at that time (Tr. 860). Fields had seen the minutes prepared by Robinson discussed, *supra,* and did not have personal knowledge of how Evans had become president (Tr. 812). Despite these uncertainties, Fields wrote (CCB Ex. 9, p. 2, second sentence), "He properly signed SRI's application as president . . . ." Fields stated he relied on earlier statements by Evans and Robinson that Evans was the president of SRI at the time he signed the modification application (Tr. 861-69, 873-75). Fields stated that after reading Robinson's August 2 letter he was under the impression that Evans had been acting as president and that certain formal steps had not been taken care of earlier (Tr. 869). He relied on Illinois lawyers for the effectiveness of an August action to validate a June representation (Tr. 894-96). Hultquist did not mention "June" in his affidavit (CCB Ex. 9, Ex. C).

57. Robinson maintained that he supplied nothing specifically for the Opposition (Tr. 543). Evans did not know who got the Hultquist affidavit (Tr. 389). Evans claimed that he did not state to Fields that he "properly signed" (Tr. 389-90). However, Evans signed Ex. D to CCB Ex. 9, an affidavit attached to the Opposition, filed August 22, 1983, stating that he was the bona fide president of SRI (Tr. 390). Evans said that he thought that was true since he had sent a check (Tr. 391). He also granted that he might, in part, have been trying to evade the charges in the petition (Tr. 392-93). Evans did not see the Opposition until after it was filed (Tr. 1437), and did not discuss it with Fields before it was filed (Tr. 1435). Fields did not recall sending a draft or reading it to him (Tr. 877-78). Evans asserts that when he read it, the "properly signed" statement on page 2 did not alert him (Tr. 1437). He did not become sure the opposition was erroneous until Ian Volner (Volner) explained the whole situation (Tr. 1423-24). It was stipulated that the meeting with Volner (and others) took place on September 29, 1983 (Tr. 1982). Evans never told the Commission prior to designation that he had not been president of SRI at the time of the modification application (Tr. 397).

F. The Transfer Application and Modification Amendment.

58. On October 11, 1983, Fields, on behalf of SRI, filed an application for transfer of control of SRI from Knudson to Evans (CCB Ex. 11). That application disclosed the "Assignment and Consent to Assignment" and the existence of the option for the first time (Attachment A to CCB Ex. 11).

59. Evans has been an engineering consultant since 1969 and has participated in the filing of applications in the broadcast service, and, to a lesser extent, common carrier applications (Tr. 1475). He is aware of the Commission requirements for transfer of control and fully realized a transfer of control application had to be filed before change in control could be consummated (Tr. 1471). He knew he had not signed a transfer application (Tr. 1457). He claims it never occurred to him that it was necessary to get Commission consent before acquiring the stock in SRI (Tr. 1454-57). Evans states it was not clear to him what constitutes legally owning a company and he thought he could act as president and purchase stock as long as it was contingent on Commission approval (Tr. 1454-55, 1458-62). Evans learned from his broadcast experience that a sale of a broadcast station was contingent on Commission approval. He claimed, however, that he had no idea what they meant. He agreed that it was logical that that meant that before stock could be transferred you needed Commission approval (Tr. 1458-59). Evans stated that it never occurred to him that his actions might be improper. Evans could provide no explanation as to why the question of the propriety of his actions never occurred to him (Tr. 1463-64). Evans never sought legal counsel as to the propriety of his action (Tr. 1467).

60. On October 28, 1983, Fields filed an amendment (CCB Ex. 13) to the modification application (CCB Ex. 6). As stated on page 3, the purpose of the amendment was to provide additional information responsive to matters raised in the petitions. Pages 4-9 (as numbered at bottom) then respond to the petitions. Page 11 has a Compucon showing of frequency coordination dated October 24, 1983; page 13 has an expanded service order dated October 21, 1983 signed by Gordon Whitehead for TCI; page 15 corrects responses in the modification application; pages 16 and 17 have a new statement of public interest; and pages 18-21 have a new Form 430.

61. Fields is reasonably sure he received the amendment from Evans (Tr. 887). Fields did not draft the amendment and does not know who prepared it (Tr. 883-86). He reviewed the amendment, made no changes and filed the amendment as received (Tr. 887-88). Although Evans signed the amendment, he was unable to provide an explanation as to why the amendment contained responses to the allegations set forth in the petitions to deny (Tr. 1465-66). He states that it was not his idea to submit the response (Tr. 1466). Evans did not prepare the 6 page narrative responding to the allegations and does not know who prepared it (Tr. 1468). Evans does not know who suggested the inclusion of a service order requesting service from SRI (Tr. 1469-70). Evans did not prepare the "Statement of Public Interest" (Tr.1471). Although Evans signed the License Qualification Form, Evans did not know the purpose for the form, did not ask that it be prepared and did not prepare it himself (Tr. 1471). Evans does not recall discussing the preparation of the amendment with Fields (Tr. 1468). Evans does recall the need for making technical changes to the modification application and discussing such changes with Fields (Tr. 1468). Evans only recalled furnishing information as to the company who was to provide maintenance service (Tr. 1470).

G. The Amendment to the Modification Application to the Designation Order

62. Evans testified that he established a separate book account for SRI about July 1983 (Tr. 180-81), and that his lawyer obtained a charter in August (Tr. 181-183). SRI also hired a secretary to keep tract of the correspondence with Compucon and "coordination notices" (Tr. 222). Evans testified he solicited customers for SRI from approximately March 1983 to the end of 1984. These solicitations consisted of form letters sent out to various entities making them aware that SRI had frequencies available. SRI received no responses to the form letters. None of the form letters have been retained (Tr. 241-49).

63. Evans was also purchasing equipment for SRI (CCB Exs. 43, 44, 47). He bought the FM equipment for SRI from MA/COM (Tr. 1482-88, CCB Ex. 48). At the time of his testimony, SRI owned one FM transmitter and a receiver, relay racks, modulators, antennas, and a spectrum analyzer (Tr. 1441-42). SRI bought the FM, but loans from Evans Associates covered some of the cost (Tr. 1442). Payments to MA/COM for the FM totalled $13-14,000, and an antenna supplier was paid $3-4,000. There were also payments to other suppliers (Tr. 1444). Meanwhile the service agreement with Telstar has continued to flux (Tr. 1503-04). There was one three-month period in the spring of 1984 when FM service was provided under tests (Tr. 1505), but there will be more negotiations if SRI is allowed to operate (Tr. 1506). Telstar has continued to send checks to SRI intermittently (CCB Ex. 50).

CONCLUSIONS

64. This proceeding concerns the application for modification of construction permit filed by SRI and an application for consent *nunc pro tunc* to transfer control of SRI. The issues to be resolved are Whether Sat-Tel while under Niemoth's and Myers' control was the real party in interest behind the SRI application and whether SRI during this period intentionally misrepresented material facts, or exhibited a lack of candor in documents filed with the Commission. The issues also require resolution whether Sat-Tel's successor, TCI, an affiliate of Telstar and/or Evans assumed control over SRI without Commission permission and whether Evans misrepresented facts and/or was lacking in candor in documents filed with the Commission.

65. The record establishes that Niemoth, 50% shareholder in SatTel controlled SRI from the time of SRI's creation until November 15, 1982 when Niemoth and Myers sold their interest in Sat Tel to Telstar. The record further establishes that SRI was not a *bona fide* common carrier but was from its inception a mere accomodation agent for its customer. Sat-Tel. Sat-Tel Has founded by Niemoth and Myers to distribute satellite television programming to Chicago apartment buildings. Sat-Tel investigated means of getting the signals to the buildings without success and Niemoth thought of using a microwave link. Niemoth learned from his lawyers that Sat-Tel would have to deliver its programs through a common carrier and that the Commission had a policy requiring that the Program distributor be unrelated to the carrier. Niemoth pas also advised that he could not be an owner, officer or

director of the carrier. Niemoth located an acquaintance, Knudson, who agreed to head up a corporation which would apply for a common carrier construction permit.

66. The record makes clear that SRI was a "sham" corporation controlled by Sat-Tel's Principals and its sole purpose was to circumvent the Commission's rules on separation of carrier and customer. Significantly, although Knudson is an attorney, Niemoth, an engineer, Has the incorporator and registered agent of SRI and paid the incorporation fees. Following incorporation. SRI was a dormant corporation. There is no record of any formal actions taken by SRI. There are no minutes reflecting stockholders or directors meetings or even the election of officers or directors. There is no evidence of any resolutions adopted by the corporation. The only corporate record of SRI appears to be a stock certificate issued to Knudson and signed by him at the closing held on November 15, 1982. Knudson did not pay for his SRI stock. Also, SRI did not have a checking count. In fact, all expenses Here paid by Sat-Tel. Also, SRI operated out of Sat-Tel's offices. All equipment of SRI was to be Purchased by Sat-Tel. SRI's only customer, and leased back to SRI. The record further reflects that Niemoth made all the decisions for SRI. Thus, Niemoth filled out Forms 435 and 430, technical and non-technical, and dealt with communications counsel. It is also clear that Niemoth's listing as technical director of SRI was subterfuge to conceal the fact that Sat-Tel has the real party in interest behind the SRI application. No employer-employee relationship existed between Knudson and Niemoth. Niemoth received no salary and it is clear that Niemoth operated independently of Knudson. rather then under his supervision and direction. Finally, Knudson's agreement to give Sat-Tel an assignable option to purchase 100% of the stock of SRI even before SRI filed its application with the Commission and his subsequent transfer of his option to Telstar at the behest of Sat-Tel belies Knudson's claimed intention to be a common carrier and demonstrates that Knudson's ostensible role as CEO and sole owner of SRI was a sham.

67. The record requires the conclusion that SRI misrepresented facts and was lacking in candor in order to conceal from the Commission the fact that Sat-Tel and its principals were the real party in interest behind the SRI application. The SRI application disclosed that Sat-Tel would own the equipment, Niemoth was the incorporator of SRI and its registered agent and the person responsible for technical operation. Item 26(b) of Form 435 requires the disclosure of agreements which affect the ownership or control of the proposed facilities. However, SRI did not disclose the fact that Sat-Tel held an assignable option to purchase 100% of SRI's stock. SRI's assertion that the option did not have to be disclosed since it did not involve ownership is not credible. It is clear that the Item 26(b)'s intent also encompasses future potential ownership. Likewise the contention that facilities only contemplates ownership of the technical hardware and not the license is unsupported. In April 1982 the Bureau wrote to SRI requesting, among other things, "an explanation of the apparent affiliation between the proposed common carrier and the customer/programmer." The Commission was focusing on this relationship between SRI and Sat-Tel and was entitled to complete candor. SRI's response was completely lacking in candor and also misrepresented facts. SRI responded that "Niemoth has performed no function on behalf of SRI since its incorporation in August, 1981... and has no relationship to SRI other than as... subscriber to its microwave system." SRI also concealed the existence of the assignable option. SRI's response knowingly misrepresented facts since, as discussed above, Niemoth performed numerous functions for SRI including preparing the application and paying SRI's bills. SRI's response that Niemoth had no relationship to SRI other than as subscriber was also patently false and lacking in candor. As discussed above, Niemoth was the moving force behind the establishment of SRI and the real party in interest. Also, the assignable option demonstrated a "relationship" beyond that of carrier and customer. Ample motive existed for the failure of SRI to provide a candid response. Full disclosure would have jeopardized Sat- Tel's efforts to secure a microwave link, critical to its distribution of programs to Chicago high rise apartment buildings.

68. As noted, *supra*, on November 15, 1982, Niemoth and Myers sold their interest in Sat-Tel to STN (later changed to TCI), a subsidiary of Telstar. Also, Niemoth and Myers assigned to STN's named designee their option to purchase the shares of SRI. Knudson consented to the assignment of the option. Although Knudson ceased any involvement with SRI, he retained the title of president and holder of SRI's stock. The mere assignment of the option did not result in transfer of *de jure* control. The passage of *de jure* control is not, however, critical. Of significance in the earlier transfer of *de facto* control which occurred after November 15, 1982 when Knudson ceased his involvement with SRI and Telstar and its consulting engineer, Evans, unilaterally made the decisions involving SRI. As documented by the record these decision involved technical changes to increase the system capacity culminating in the June 1983 modification application signed by Evans as president of SRI as well as non-technical decisions including the financing of SRI's costs.

69. Counsel for Telstar and SRI urges that Evans (without Commission authority) assumed control of SRI on or shortly before the date the modification application was filed and there is no evidence Evans was controlled by Telstar. Counsel's contention overlooks pertinent facts. Initially, Evans was hand picked by Telstar because Telstar officials were convinced Evans could be trusted to look after its interests. There was reason for such confidence since Evans is a nephew of Telstar's Chairman of the Board and has received considerable remuneration as Telstar's consulting engineer. In addition, Evans owns stock in Telstar, although the amount appears to be minimal. In addition, Evans paid nothing when the option was assigned to him and all or substantially all of SRI's expenses are paid by Telstar. Moreover, like in the case of Knudson, Evans will serve a single customer. Further, the contention that SRI is not under the control of Telstar can not be reconciled with Telstar's involvement in SRI's modification application, other documents filed with the Commission by SRI and the steps taken by Telstar officials to legitimate SRI; i.e. exercise of the option, election of Evans as officer and ratification of SRI's prior actions. Briefly recited, the modification application lists TCI's Chicago address as applicant's address and lists an official of TCI as the person to contact. Moreover, Evans testified he signed the application as president only because he was told to do so by Robinson, a Telstar official. Surely, if Evans was in control of SRI, Evans, rather than Robinson, would have made this important decision. The record also reflects participation of Telstar officials in the opposition to the petition to deny

and the transfer of control application. Also, Evans could provide no explanation as to the reasons for filing the October 28, 1983 amendment and had no role in its preparation other than supplying the name of the company which was to provide maintenance service. Since Fields did not prepare the amendment, the obvious conclusion is that Telstar was responsible for the amendment. Finally, Robinson's role in legitimatizing SRI, discussed in paragraphs 48-54, need not be repeated here. Therefore, there is considerable doubt whether Evans is or would be independent of Telstar. Suffice it to say, SRI has not met its burden of demonstrating that SRI is a "bona fide" common carrier.

70. The unauthorized transfer of control of SRI was not reported to the Commission until October 1983, when SRI filed its application for transfer of control. Counsel for SRI and Telstar urges the unauthorized transfer of conduct should be forgiven since Evans and SRI came forward and confessed that an unauthorized transfer of control took place. The record does not permit such disposition. Initially, the "confession" was not voluntary but rather the direct result of petitions to deny filed on July 29 and August 1, 1983. SRI and Evans had no choice. Further concealment was useless in light of the revelations in the petitions to deny. In addition, the failure to seek Commission approval was not inadvertent. Telstar and Evans were fully aware their actions constituted an assumption of control and that Commission approval was required. What is apparent is that neither Telstar or Evans were concerned about obtaining Commission approval. Their attitude was that if they were found out they could always claim the failure to comply with Commission requirements was inadvertent and seek Commission approval *nunc pro tunc*. In sum, SRI and Evans' "confession" does not excuse or mitigate the seriousness of the misconduct.

71. It is also urged that Evans did not misrepresent facts in documents filed with the Commission since there is no proof of an intent to mislead. A contrary conclusion is required. Evans misrepresented facts in signing the modification application as president of SRI. Evans was well aware his representation was false since he knew at the time that he had not exercised his option to acquire SRI and he was not an officer of SRI. Contrary to the assertions made in SRI's and Telstar's Reply Findings, there is no basis for the suggestion that Evans may have been confused about his status as a corporate officer. On the contrary, Evans was well aware he held no position with SRI, official or unofficial. Evans initially did not intend to sign the application since when he went through the form, it was filled out as though the existing licensee, Knudson, would submit the application. In fact, according to Evans, he signed as president only because he was so instructed by Robinson. Evans asserted at the hearing that he believed at that time that his action was proper. Evans' statement is not credible and appears to be an attempt to rationalize his prior wrongful action. The record requires the conclusion that Evans knew then as he has admitted he now knows that it was not proper to sign as president of SRI. A motive existed for Robinson to direct Evans to sign the application as president. It is clear that the modification application was filed in order to make engineering changes considered necessary. The modification application form required a certification by a principal of SRI (CCB Ex. 6, p. 29). Evans was directed to sign as president to satisfy this requirement. In so doing, Telstar and Evans sought to deceive the Commission into believing that the action was authorized by SRI. Telstar and Evans would have succeeded in their deception if the petitions to deny had not exposed the scheme.

72. Evans subsequently had a chance to be forthcoming about signing the application as president or to "stonewall." Evans chose to "stonewall." Petitions to deny the application were filed by CVI and MRC questioning among things the change from Knudson to Evans as owner and president and whether SRI was a phanton carrier. Fields wrote a letter to Robinson and Evans enclosing the CVI petition. SRI's opposition filed August 22, 1983 misrepresented facts by stating that Evans "properly signed" SRI's application as president. The opposition contained an affidavit from Evans stating that he was the "bona fide" president of SRI. Evans, however, claimed he did not see the opposition or discuss it with Fields before it was filed. Evans does admit he saw the opposition after it was filed. Evans did not take any steps to correct the opposition. Evans asserts that when he read the "properly signed" statement, it did not alert him and he did not become sure the opposition was erroneous until Telstar's counsel explained the situation in a meeting held on September 29, 1983. Evans can not escape culpability for the misrepresentations made in the opposition and his explanation at the hearing shows his unwillingness to be candid and forthcoming at this late date. Evans knew questions had been raised about the propriety of his signing the application as president when he received a copy of CVI's petition, In addition, the fact that he prepared an affidavit further demonstrates his knowledge and participation in the opposition. In this connection, with respect to his affidavit. Evans conceded that he might have been trying to evade the charges in the petition. Having been alerted to the questions raised, it was incumbent upon Evans to insure that the response was truthful. Under the circumstances, although the opposition was prepared by counsel, Evans was fully responsible for its contents and is culpable for the misrepresentations of fact. Moreover, alerted by the charges made, it strains credulity that when Evans read the opposition consisting of two pages he was not fully conscious of the purport of the "properly signed" statement. Evans knew then, if not before, that the statement was erroneous but elected to remain silent and conceal the facts from the Commission. Such concealment was consistent with Evans' admission, made with respect to his affidavit, that he might have been trying to evade the charges in the petition.

73. The Commission must depend on the accuracy and truthfulness of its licensees' representations. The Commision's reliance on its licensee's integrity is as essential to common carrier applicants as it is to those of broadcasters. A breach of that trust is grounds for character disqualification. *Mobilfone Communications*, 95 FCC 2d 668 (Rev. Bd. 1983); *Pass Word, Inc.*, 76 FCC 2d 465 (1980), aff'd for curiam *Pass Word, Inc.*, v. *FCC*, 673 F.2d 1363 (D.C. Cir.), cert. denied, 103 S.CT. 89 (1982). SRI and its principals, disclosed and undisclosed, have engaged in a pattern of deliberate misrepresentation and concealment since its inception. Also, it has been determined that SatTel was the real party in interest behind SRI, that Evans and Telstar were guilty of an unauthorized transfer of control of SRI, and that sustantial doubt exists that SRI was and is a "bona fide" common carrier. In view of the demonstrated lack of character qualifications, the public interest requires the denial of the pending modification and transfer of control applications.

Counsel for SRI and Telstar argue, because revocation of the construction permit is not contemplated by the designation order, that the refusal to grant the transfer application would result in restoring Niemoth to control of SRI. This argument would have merit if Knudson was the sole guilty party and Evans, the proposed transferee, was blameless. Since this is not the case, transfer to Evans can not be justified.[1] In addition, the Designation Order specifies that "(N)o service shall be instituted prior to express approval by the Commission" (paragraph 18). It is reasonable to conclude that service will not be permitted if this decision is upheld. Thus, even assuming Niemoth should assume control of SRI, in the absence of service authorization such event would appear to be of no consequence.

74. Accordingly, IT IS ORDERED, That the applications of Satellite Relay, Inc. for modification of a construction permit at Evanston, Illinois, and for consent *nunc pro tunc* to transfer control from Jon W. knudson to Ralph E. Evans, III, ARE DENIED.[2]

FEDERAL COMMUNICATIONS COMISSION

Joseph Chachkin
Administrative Law Judge
Federal Communications Commission

FOOTNOTES

[1] *Cosmopolitan Broadcasting Corporation*, FCC 86-195 (Released May 1, 1986) cited by counsel for Telstar and SRI is inapposite. Here, unlike the facts of that case, there is evidence of deliberate misrepresentations and concealment and the failure to comply with Section 310(d) was not inadvertent.

[2] In the event exceptions are not filed within 30 days after release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d) and 22.916(b)(9) of the Commission's Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-409

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Panama City, Florida)	RM-5387

NOTICE OF PROPOSED RULE MAKING

Adopted: October 9, 1986 **Released: November 5, 1986**

By the Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Bay Media, Inc. permittee of Station WLVV(FM), Panama City, Florida, (Channel 292A), requesting the substitution of Channel 290C2 for Channel 292A, and modification of the Class A permit, accordingly.

2. In support of the proposal, petitioner states that of the six channels allocated to Panama City, only Station WLVV(FM) operates as a Class A facility. The requested change would enable Station WLVV(FM) to provide more competitive and efficient service to its community of license.

3. We believe that the public interest would benefit from the proposed substitution of channels. Channel 290C2 can be allocated to Panama City in compliance with the minimum distance separation requirements of Section 73.207(b) of the Rules.

4. In accordance with our established policy, we shall propose to modify the permit of Station WLVV(FM) to specify operation on Channel 290C2. Under our current policy, we shall not accept other expressions of interest in the Class C2 allotment for Panama City. See Section 1.420(g) of the Commission's Rules, *Modification of FM Broadcast Licenses to Higher Class Adjacent and Co-Channels* (MM Docket 85-313) 51 FR 20290, published June 4, 1986.

5. In order to provide Panama City, Florida, with its fifth wide area coverage station, the Commission proposes to amend the FM Table of Allotments, Section 73.202(b) of the Rules, with regard to the community listed below:

	Channel No.	
City	Present	Proposed
Panama City, Florida	223, 253, 278 292A, 300	223, 253, 278, 290C2, 300

6. Interested parties may file comments on or before December 26, 1986 and reply comments on or before January 12,1987, and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Heidi P. Sanchez
Fly, Shuebruk, Gaguine,
Boros and Braun
1211 Connecticut Avenue, N.W.
Washington, D.C. 20036
(Counsel for petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings, to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See, *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202(b), 73.504 and 73.606(b) of the* Commission's Rules, 46 Fed. Reg. 11549, published February 9, 1981.

8. For further information concerning this proceeding, contact Montrose H. Tyree, Mass Media Bureau (202) 634-6530. However, members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. An *ex parte* contact is a message (spoken or written) concerning the merits of a pending rule making, other than comments officially filed at the Commission, or oral presentation required by the Commission. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes *an ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Charles Schott
Chief, Policy and Rules Division

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(d)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the Notice of Proposed Rule Making to which this Appendix is attached.

2. Showings Required. Comments are invited on the proposal(s) discussed in the Notice of Proposed Rule Making to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. Cut-off Procedures. The following procedures will govern the consideration of filings in this proceeding. (a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.) (b) With respect to petitions for rule making which conflict with the proposal(s) in this Notice, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket. (c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. Comments and Reply Comments; Service. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the Notice of Proposed Rule Making to which this Appendix is attached. All submissions by parties to this proceeding or persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied' by a certificate of service. .(See Section 1.420(a), (b) and (c) of the Commission s Rules.)

5. Number of Copies. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, brief r other documents shall be furnished the Commission.

6. Public Inspection of Filings. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street, N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-410

Amendment of Section 73.202(b)	RM-5469
Table of Allotments,	RM-5428
FM Broadcast Stations	
(Columbia, Missouri)	

NOTICE OF PROPOSED RULE MAKING

Adopted: October 9, 1986 Released: November 5, 1986

By the Chief, Policy and Rules Division:

1. Before the Commission for consideration are two separate petitions for rule making. George Thomas ("Thomas"), seeks the allocation of FM Channel 230A to Columbia, Missouri, and Gail C. Mooney ("Mooney") requests the allotment of FM Channel 223A to Columbia, Missouri. The proposals could provide Columbia with its fourth and fifth commercial FM broadcast service. Thomas and Mooney filed information in support of their requests and each stated their intention to file an application for the respective channel.

2. Channel 223A can be allocated to Columbia consistent with the Commission's spacing requirements provided there is a site restriction 8.8 kilometers (5.5 miles) northwest of the community. The site restriction will prevent a short spacing to the 16 kilometer buffer zones of Station WIL-FM, Channel 222, St. Louis, Missouri, and Station KGRC(FM), Channel 225, Hannibal, Missouri. Channel 230A can be allocated to Columbia, Missouri, in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules provided a construction permit (BPH850628IM) filed by Station KSD-FM, Channel 229, St. Louis, Missouri, to increase its facilities to the Class C standards is approved by the Commission. At present, the proposal for Channel 230A at Columbia would be short spaced to the 16 kilometer buffer zone of Station KSD-FM. Channel 230A would not be available for application at Columbia until a license is issued for Station KSD-FM as a full Class C facility as proposed.

3. In view of the fact that the proposed allocation could provide a fourth and fifth FM broadcast service to Columbia, Missouri, the Commission believes it is appropriate to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
Community	Present	Proposed
Columbia, Missouri	244A, 252A, 269A	223A, 230A, 244A, 252A, 269A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. NOTE: A showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before December 26, 1986 and reply comments on or before January 12,1987, and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

George Thomas
1401 Paris Road
Columbia, Missouri 65201

Gail C. Mooney
1501-212 Vandiver
Columbia, Missouri 65202

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See, *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 Fed. Reg. 11549, published February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. However, members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. An *ex parte* contact is a message (spoken or written) concerning the merits of a pending rule making, other than comments officially filed at the Commission, or oral presentation required by the Commission. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Charles Schott
Chief, Policy and Rules Division

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(d)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the Notice of Proposed Rule Making to which this Appendix is attached.

2. Showings Required. Comments are invited on the proposal(s) discussed in the Notice of Proposed Rule Making to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. Cut-off Procedures. The following procedures will govern the consideration of filings in this proceeding. (a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.) (b) With respect to petitions for rule making which conflict with the proposal(s) in this Notice, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket. (c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. Comments and Reply Comments; Service. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the Notice of Proposed Rule Making to which this Appendix is attached. All submissions by parties to this proceeding or persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied' by a certificate of service. .(See Section 1.420(a), (b) and (c) of the Commission s Rules.)

5. Number of Copies. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, brief r other documents shall be furnished the Commission.

6. Public Inspection of Filings. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street, N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-411

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Liberty, Texas)	RM-5462

NOTICE OF PROPOSED RULE MAKING

Adopted: October 9, 1986 **Released: November 5, 1986**

By the Chief, Policy and Rules Division:

1. Before the Commission for consideration is a petition for rule making filed by Trinity River Valley Broadcasting Company ("petitioner"), licensee of daytime-only AM Station KPXE, Liberty, Texas, requesting the allotment of Channel 264C2 to Liberty as that community's first FM service. Petitioner stated its intention to apply for the channel, if allotted.

2. Channel 264C2 can be allotted to Liberty in compliance with the Commission's minimum distance separation requirements with a site restriction of 27.0 kilometers (16.7 miles) east of the city. This restriction is necessary to avoid short spacings to station KILT-FM, Channel 262, Houston, Texas, and Station KLOL(FM), Channel 266, Houston, Texas. At this restricted site, there is a short spacing to the Class C Station KAYD(FM), Beaumont, Texas. However, this station currently has a construction permit to operate as a Class C1 facility. Therefore, while we shall proceed with this rule making proposal, the Commission would not open a filing window on this channel until Station KAYD(FM) receives a license to cover the construction permit.

3. In view of the fact that the proposed allotment could provide a first FM service to Liberty, Texas, the Commission believes it is appropriate to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Liberty, Texas	—	264C2

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. NOTE: A showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before December 26, 1986 and reply comments on or before January 12, 1987, and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Trinity River Valley Broadcasting Co.
517 Travis
Liberty, Texas 77575
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See, *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 Fed. Reg. 11549, published February 9, 1981.

7. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. However, members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. An *ex parte* contact is a message (spoken or written) concerning the merits of a pending rule making, other than comments officially filed at the Commission, or oral presentation required by the Commission. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Charles Schott
Chief, Policy and Rules Division

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(d)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the Notice of Proposed Rule Making to which this Appendix is attached.

2. Showings Required. Comments are invited on the proposal(s) discussed in the Notice of Proposed Rule Making to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. Cut-off Procedures. The following procedures will govern the consideration of filings in this proceeding. (a) Counterproposals advanced in this proceeding itself will

be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.) (b) With respect to petitions for rule making which conflict with the proposal(s) in this Notice, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket. (c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. Comments and Reply Comments; Service. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the Notice of Proposed Rule Making to which this Appendix is attached. All submissions by parties to this proceeding or persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied' by a certificate of service. .(See Section 1.420(a), (b) and (c) of the Commission s Rules.)

5. Number of Copies. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, brief r other documents shall be furnished the Commission.

6. Public Inspection of Filings. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street, N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-413

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (State College and University Park, Pennsylvania)	RM-5510

NOTICE OF PROPOSED RULE MAKING

Adopted: September 26, 1986 Released: November 5, 1986

By the Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed on behalf of Destiny Communications, Inc. ("petitioner") requesting the allocation of Channel 233A to State College. Pennsylvania, as the community's second local FM service.[1] Petitioner states that it will apply for the channel, if allocated. Channel 233A can be allocated to State College in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.

2. State College and University Park are located within 320 kilometers (199 miles) of the U.S.-Canadian border. Therefore, the concurrence of the Canadian Government in these allotments will be sought.

3. We believe the public interest would be served by proposing the allocation of Channel 233A since it could provide State College with its second local FM service. Accordingly, we propose to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
State College, Pennsylvania	244A, 276A	233A, 276A
University Park, Pennsylvania	—	244A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. NOTE: A showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before December 26, 1986 and reply comments on or before January 12, 1987, and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Richard J. Hayes, Jr.
1359 Black Meadow Road
Spotsylvania, Virginia 22553
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings, to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See, *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202(b), 73. 504 and 73. 606(b) of the Commission ' s Rules*, 46 Fed. Reg. 11549, published February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro. Mass Media Bureau, (202) 634-6530. However, members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. An *ex parte* contact is a message (spoken or written) concerning the merits of a pending rule making, other than comments officially filed at the Commission, or oral presentation required by the Commission. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Charles Schott
Chief, Policy and Rules Division

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(d)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the Notice of Proposed Rule Making to which this Appendix is attached.

2. Showings Required. Comments are invited on the proposal(s) discussed in the Notice of Proposed Rule Making to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. Cut-off Procedures. The following procedures will govern the consideration of filings in this proceeding. (a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.) (b) With respect to petitions for rule making which conflict with the proposal(s) in this Notice, they will be considered as comments in the proceeding, and Public Notice to

this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket. (c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. Comments and Reply Comments; Service. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the Notice of Proposed Rule Making to which this Appendix is attached. All submissions by parties to this proceeding or persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied' by a certificate of service. .(See Section 1.420(a), (b) and (c) of the Commission s Rules.)

5. Number of Copies. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, brief r other documents shall be furnished the Commission.

6. Public Inspection of Filings. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street, N.W., Washington, D.C.

FOOTNOTES

[1] Channel 244A is currently allocated to State College, Pennsylvania, but used at University Park by Station WQWK, under the former 10-mile rule, Section 73.203(b) of the Commission's Rules. We shall therefore reallocate the channel to University Park to reflect its actual use in the community.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of

DAVID L. TRUITT FOIA Control No. 86-122

On Request for Inspection
of Records

Order

Adopted: October 24, 1986; Released: November 5, 1986

By the Commission:

1. Before the Commission is an Application for Review filed on September 15, 1986, by David L. Truitt (Truitt), seeking review of a decision entered by the Chief, Field Operations Bureau (Bureau) on September 2, 1986. That ruling denied, in part, Truitt's request for inspection of records under the Freedom of Information Act (FOIA), 5 U.S.C. 552. The requestor sought the identity of an individual who had filed a complaint against him with the Commission's Kansas City Field Office concerning his operation of a repeater in the Amateur Radio Service.

2. We have fully reviewed the foregoing and find no reason to disturb the rationale, or result, of the Bureau's ruling.

3. IT IS ORDERED, That pursuant to 47 U.S.C. 155(c)(5) and section 1.115(g) of the Commission's rules,[1] the Application for Review filed by David L. Truitt IS DENIED.

4. The Requestor may seek judicial review of this decision pursuant to 5 U.S.C. 552(a)(4)(B). The officials responsible for this action are the following Commissioners: Chairman, Mark S. Fowler, Commissioner, James H. Quello, Commissioner, Mimi Weyforth Dawson, Commissioner, Dennis R. Patrick, Commissioner Patricia Diaz Dennis.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

FOOTNOTES

[1] 47 C.F.R. § 1.115(g).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

LAKELAND CELLULAR TELEPHONE COMPANY File No. 32888-CL-P-114-A-84

For a construction permit to establish a cellular system operating on frequency Block A in the Domestic Public Cellular Radio Telecommunications Service for the Lakeland-Winter Haven, Florida Metropolitan Statistical Area (MSA)

MEMORANDUM OPINION AND ORDER

Adopted: October 29, 1986; Released: November 5, 1986

By the Common Carrier Bureau:

1. The application of Quick Call Cellular, Inc. ("Quick Call") was selected first in the lottery held for the Lakeland-Winter Haven ("Lakeland"), Florida MSA on February 24, 1986. Quick Call was a member of the Lakeland Cellular Telephone Company ("LCTC") partnership, a pre-lottery settlement group. Through amendments, LCTC has been substituted as the tentative selectee.[1] First Cellular of Lakeland-Winter Haven ("First Cellular") and The Alliance[2] have filed petitions to deny the application of LCTC for the non-wireline construction permit in the Domestic Public Cellular Radio Telecommunications Service for the Lakeland market. LCTC has filed a consolidated opposition to the petitions to deny.

Financial Qualifications

2. Both First Cellular and The Alliance contend that LCTC has failed to provide a reasonable assurance of available financing to construct the proposed system and to operate it for one year. The petitioners assert that the bank letter from the First National Bank of Chicago ("First Chicago") requires the submission of guarantees as a condition for the loan, and that the letter does not specify what guarantees will be required. It is further argued that the LCTC principals have failed to indicate a willingness to provide the necessary guarantees.

3. In the *Cellular Lottery Rulemaking*, 98 FCC 2d 175, 219, 56 Rad. Reg. 2d (P&F) 8, 39 (1984), *recon.*, 58 Rad. Reg. 2d (P&F) 677 (1985), *further recon.*, 59 Rad. Reg. 2d (P&F) 407 (1985), we required all applicants for markets 91-120, such as Lakeland, to provide a reasonable assurance of financial ability to construct and operate their proposed system. We have reiterated that we have long relied upon the reasonable assurance test of *Multi-State Communications, Inc. v. FCC*, 590 F. 2d 1117 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 959 (1979), and that, in applying this test, we determined a bank letter must identify the applicant, be market specific, and contain sufficient terms of the proposed loan. *See Round IV Cellular Applications-Financial Qualifications, Order on Reconsideration*, FCC 86-46, Mimeo No. 36444, para. 14, released January 24, 1986.

4. The First Chicago bank letter identifies LCTC as the tentative lottery selectee for the Lakeland MSA. Moreover, the letter states the bank's willingness to provide $5 million to LCTC for the construction and operation of Lakeland's non-wireline cellular system. Finally, the letter spells out the conditions for receipt of the loan, including the documents that must be executed and the collateral and other guarantees that must be given. Recently, we reviewed the almost identical bank letter from the First National Bank of Chicago in *Shreveport Cellular Telephone Company*, Mimeo No. 6826, released September 11, 1986, and in *Corpus Christi Cellular Telephone Company*, Mimeo No. DA 86-50, released October 15, 1986, and in both cases found that the letter complied with our reasonable assurance standard. Likewise we find that the First Chicago bank letter to LCTC fully complies with our financial standards.

U.S. Cellular, Inc.'s Application

5. U.S. Cellular, Inc.'s (USCI) application provides the engineering portion of LCTC's application.[3] The Alliance contends that USCI's application is defective under Section 22.917 of the Commission's Rules because it has failed to include acceptable documentation of financial ability. Therefore, The Alliance argues that LCTC's application must be dismissed because the Commission has a policy of disallowing cumulative chances based on unacceptable applications. Specifically, The Alliance asserts that the letter from European American Bank (EAB) is styled "gentlemen" and does not contain any reference to USCI in the text of the letter. According to The Alliance, the EAB letter is the same as the "Dear Applicant" bank letters found defective by the Commission.

6. LCTC responds that USCI's application survives only for the purpose of its engineering section, and thus USCI's financial qualifications showing is irrelevant. The partnership, LCTC points out, has demonstrated reasonable assurance of financing independent of USCI's financial showing. Moreover, LCTC argues that USCI's bank letter from EAB is not deficient and that it can be distinguished from the "Dear Applicant" letters in which the individual applicant's financial qualifications had not been considered. Here, LCTC contends, the fact that the bank did not name USCI in the body of the letter is insufficient to demonstrate that the bank did not consider USCI's individual financial qualifications. Furthermore, argues LCTC, USCI was not a party to a pre-filing agreement as were the applicants filing deficient "Dear Applicant" bank letters.

7. We agree with LCTC that the financial qualifications showing of USCI's application, which provides only the engineering proposal, is irrelevant. The Commission has stated explicitly that petitions to deny will be allowed only against the tentative selectee in the interests of administrative efficiency. *Cellular Lottery Rulemaking, supra* at para. 73. In the instant case, LCTC has been substituted for Quick Call as the tentative selectee and, therefore, the financial qualifications showings of only the LCTC partnership and Quick Call are relevant.

8. However, even if we address the issue of USCI's financial qualifications, we find that the EAB commitment letter is not deficient under the reasonable assurance standard. The bank letter clearly refers to USCI in the heading, and contains all of the statements required to show reasonable assurance of commitment. *Multi-State, supra.*

Ownership Reporting Requirement

9. In its amendment of March 19, 1986, LCTC listed the names of five members of its Executive Committee, and stated that the "day-to-day operations of the Partnership are governed" by this Executive Committee.[4] Both First Cellular and The Alliance allege that LCTC failed to comply with Section 22.13(a)(1)(i) of the Rules since it did not disclose for each Executive Committee member the subsidiaries or businesses in which these individuals hold 5 per cent or more interest.

10. LCTC points out that the information required by Section 22.13(a)(1)(i) may be found for each of the Executive Committee members in applications already on file with the Commission, and the file number for each partner's original application was included in LCTC's March 19 amendment. Moreover, LCTC provides a supplement to its application containing the Section 22.13(a)(1)(i) information.[5]

11. We find that LCTC has complied with the Commission's Rules governing disclosure of the real party in interest. The petitioners are correct in asserting that LCTC's Executive Committee members are "key management personnel" of the applicant, and as such must provide a list of their subsidiaries. However, this disclosure issue is rendered moot by LCTC's supplement, which contains the information required by Section 22.13(a)(1)(i). This finding is consistent with our recent decisions concerning the ownership reporting requirements of Executive Committee members. *See Huntington Cellular Telephone Company*, Mimeo No. 7087, paras. 9-11, released September 25, 1986, and *Davenport Cellular Telephone Company*, Mimeo No. DA 86-59, para. 4, released October 15, 1986.

12. After careful review of the application and the related pleadings, we find LCTC to be financially, legally, technically and otherwise qualified to be a Commission licensee.

Ordering Paragraphs

13. Accordingly, IT IS ORDERED that the application of Lakeland Cellular Telephone Company, File No. 32888-CL-P-114-A-84, IS GRANTED.

14. IT IS FURTHER ORDERED that the Petition to Deny filed by First Cellular of Lakeland-Winter Haven IS DENIED.

15. IT IS FURTHER ORDERED that the Joint Petition to Dismiss or Deny filed by The Alliance IS DENIED.

16. This order is issued under Section 0.291 of the Commission's Rules and is effective on its release date. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Rules may be filed within 30 days of the date of public notice of this order. *See* Section 1.4(b)(2) of the Rules.

Kevin J. Kelley
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] The Commission announced LCTC as the tentative selectee in Public Notice, Report No. CL-86-104, Mimeo No. 3530, released April 2, 1986. The LCTC application is composed of the application of Quick Call, File No. 32888-CL-P-114-A-84, as amended March 19, 1986, regarding ownership, legal and financial qualifications, and the application of U.S. Cellular, Inc., File No. 31576-CL-P-114-A-84, as amended March 19, 1986, regarding technical and engineering proposals.

[2] The Alliance is a group of cellular applicants who have entered into a partial settlement agreement for the non-wireline cellular license in the Lakeland-Winter Haven, Florida MSA.

[3] LCTC designated the application of USCI, one of LCTC's partners, as the partnership's "surviving application." *See* Amendment to LCTC Application, filed March 19, 1986. However, LCTC adopted only the engineering proposal of USCI's application. *See* Amendment at Exhibit 4.

[4] LCTC March 19, 1986, Amendment, Exhibit 1, p. 2.

[5] LCTC Consolidated Opposition to Petitions to Deny, Exhibit 5, June 18, 1986.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

AMERICAN PAGING, INC.
(OF FLORIDA) File No. 24560-CD-MP/ML-85

For an extension of time File No. 24594-CD-MP/ML-85
to construct Station KNKD984 to
operate on frequency 152.84 MHz
and Station KNKC235 to operate
on frequency 454.575 MHz in the
Public Land Mobile Service at
Middleburg, Florida

ORDER ON RECONSIDERATION

Adopted October 30, 1986; Released: November 6, 1986

By the Chief, Common Carrier Bureau:

1. American Paging, Inc. (API) has filed a Petition for Reconsideration of the denial of its request for an extension of time to construct the captioned facilities. API contends that the extension request is justified by the wholly unforeseen loss of its proposed site. After a careful review of the issues raised, we find no merit in API's arguments and deny its Petition for Reconsideration.

2. On January 24, 1984, API received a letter from Clay Video, Inc. (Clay) stating its willingness to negotiate a tower use lease of its facility at Orange Park, Florida provided the proposed frequencies were compatible with the frequencies in use at the site, space was still available, and a firm lease agreement could be negotiated. API applied for construction permits and authorizations to construct facilities on frequencies 454.575 and 152.84 MHz. Authorizations were granted on August 23, 1984, and August 29, 1984, respectively. API notified Clay by letter that it had received a grant and was "proposing to construct at your tower site within 60 days. . . .Please initiate a site agreement for the above site, include any technical parameters which we must follow, and return to me." API asserts that it received no response from this or later inquiries and did not find out that Clay had decided not to allow it to use its tower until early March 1985 when equipment, which had been ordered November 9, 1984, was scheduled for delivery. API maintains that it diligently sought an alternative site, but had great difficulty locating a suitable replacement because of the sparse population in the area necessary to meet its needs. A three-year lease was subsequently negotiated with the Ed Voss Electric Company which commenced on August 22, 1985. API later requested a modification of its construction permit to allow the relocation of the company's facilities and an extension of time to construct. On November 20 and 21, 1985, the Division denied the requests for an extension of time. In its denial, the Division stated that the "Evaluation of the referenced application . . . discloses that the reason submitted for justification of the request is unacceptable. Section 22.43(b)(1) . . . states in part that no extension will be granted for lack of site availability. Therefore, the request is denied and the construction authorization forfeited."

3. API states in its petition that Section 22.43(b)(1) expressly allows extensions if the failure to timely complete construction is due to causes beyond the applicant's control. API asserts that it secured a site prior to filing the application and made a good faith effort to construct, but that it was prevented from timely constructing by Clay's decision not to lease its tower. In further support of its request, API alleges that neither frequency at issue here can be assigned to another party at this juncture, given its current operations on these frequencies. API requests that the Commission extend its construction permit until April 1986 and simultaneously grant its pending applications to relocate its facilities to its new location.

4. Section 22.43(b)(1) of the Commission's rules clearly states that: "Extensions [of time to complete construction] will be granted only if the applicant shows that the failure to complete is due to causes beyond its control. No extensions will be granted for delays caused by lack of financing, lack of site availability, for the transfer of an authorization, or for failure to timely order equipment." After a review of the information submitted by API, we find the applicant has not diligently acted in securing a location for its facility and that the delay in construction was the result of its own inaction rather than due to causes beyond its control. First, its agreement with Clay was clearly contingent upon several factors, including space availability and the compatibility of the frequencies in use at the time. In light of the conditional nature of the Clay commitment, API lacked due diligence in failing to follow up Clay's lack of response to its efforts to negotiate a firm leasing arrangement more quickly. It was unreasonable for API to fail to see the need to pursue new site availability options during the almost seven months required to get a firm negative from Clay. It is undisputed that API was not notified until early March that the Clay site was not available. It seems clear that API could have anticipated Clay's refusal during the seven months of no response and acted more promptly in securing a second site.

5. Accordingly, IT IS ORDERED That the Petition for Reconsideration filed by American Paging, Inc. (of Florida), File Nos. 24560-CD-MP/ML-85 and 24594-CD-MP/ML-85, IS DENIED.

6. This order is issued under Section 0.291 of the Commission's rules and is effective on its release date. Applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order. *See*Section 1.4(b)(2).

Albert Halprin
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 86-126

In the Matter of

Amending Part 94 of the Commission's Rules to Provide for the Inclusion of the FCC ID Number of Transmitting Equipment and Make and Model of Antennas in the Frequency Engineering Analysis Accompanying Applications for Licenses to Operate in the Private Operational-Fixed Microwave Service. RM-5202

REPORT AND ORDER

Adopted: October 24, 1986; Released: November 6, 1986

By the Commission:

Background

1. On April 8, 1986, the Commission adopted a *Notice of Proposed Rule Making* (*Notice*) in this proceeding to amend Part 94 of its rules governing the Private Operational-Fixed Microwave Service (OFS).[1] The *Notice* was issued in response to a petition for rule making, RM-5202, filed by the Harris Corporation - Farinon Division (Harris).

2. Harris' petition requested that OFS applicants be required to provide the FCC ID number assigned to transmitting equipment, and the make and model number of the proposed system's antennas, as part of the frequency engineering analysis required by Section 94.15(b) of the Commission's rules.[2] Applicants for new or modified OFS facilities are required to submit a frequency engineering analysis of the potential interference that their proposed facilities may cause to previously-authorized and applied-for stations.

3. The June 1982 version of the FCC Form 402, Application for a License in the Private Operational-Fixed Microwave Radio Service, required applicants to provide the microwave transmitter's FCC ID number and the make and model numbers of the antennas. However, in August 1985, to reduce the public's paperwork burden and make more efficient use of the Commission's limited staff resources, the Commission revised Form 402 to remove data elements that were not critical to the staff's processing of applications. Among the data elements removed were the transmitter's FCC ID number and the make and model numbers of the antennas.

4. The Harris petition maintained that transmitter and antenna performance characteristics are critical elements to microwave frequency engineers, and that even if that information is not included on the application form itself, the transmitter's FCC ID number and the antennas' make and model numbers should be included on the frequency engineering analysis submitted with applications.

5. In consideration of RM-5202, the *Notice* proposed to require applicants to furnish this transmitter and antenna information to the frequency engineering firm or other entity performing the required frequency engineering analysis. Additionally, recognizing the value of this information to the microwave frequency engineering process, we proposed adding language to the rule section requiring frequency engineering analyses to include consideration of the technical characteristics of the transmitting equipment that an applicant proposes to use, as indicated by the FCC ID number of the transmitter and the make and model numbers for all antennas the applicant proposes to use.

6. Comments and reply comments in response to the*Notice* were submitted by the following parties:

Comments

Aerospace and Flight Test Radio Coordinating Council (AFTRCC)
Central Committee on Telecommunications of the American Petroleum Institute (API)
Association of American Railroads (AAR)
Comsearch, Inc.
Harris Corporation - Farinon Division (Harris)
MCI Telecommunications Corp. (MCI)
Motorola, Inc.
National Spectrum Managers Association (NSMA)
Rockwell International - Collins Transmission Systems Division (Rockwell)
Spectrum Planning, Inc. (SPI)

Reply Comments

AAR
Harris
SPI
Utilities Telecommunications Council (UTC)

Discussion

7. All of the commenters concur in the objective of our proposal, which is to assure that technical information regarding the transmitter and antennas is provided and available to parties who perform frequency engineering analyses. However, most commenters assert that our proposal is inadequate. They believe the transmitter and antenna information to be so important as to warrant its mandatory inclusion on the frequency engineering analysis. AAR, Harris, MCI and Rockwell urge us to require that the transmitter and antenna information be explicitly identified in the frequency engineering analysis.[3]

8. A key concern of the commenters is that technical information regarding transmitters and antennas be readily accessible to all interested parties. Motorola, Comsearch and SPI assert that the subject information is critical to an accurate assessment of the potential interference levels that OFS systems, both existing and proposed, may experience. Stating that the Commission should never have removed the subject data elements from the Form 402, these commenters assert that this information must be included with every OFS application so that future applicants seeking to engineer-in private microwave systems have one central location (the Commission's files) from which transmitter and antenna information can be retrieved. Acknowledging that the Commission's staff does not use this information to process applications, these commenters urge us to collect the information in any case.

9. NSMA observes that microwave frequency engineering firms use their own detailed OFS data bases in performing frequency engineering analyses, and that they survey OFS applications and licenses to maintain and update these data bases. To allow microwave coordinators to update their data bases on a timely basis, NSMA, MCI and SPI propose, in effect, that the rules be amended so that any change in an OFS system's transmitting equip-

ment or antennas would be either placed on public notice, subject to prior Commission approval, or reported to the Commission.[4]

10. SPI believes that the Commission's responsibility to enhance spectrum utilization dictates that we place the subject transmitter and antenna data in the public files. According to SPI, ideally this information should be contained on the OFS license itself, and hence be part of our microwave data base. SPI believes that while our proposal requiring consideration of the subject data on the frequency engineering analysis may be satisfactory for the evaluation of current OFS applications, it does not guarantee the retention of this information in a centralized public file for use by future applicants.

11. Rockwell believes the subject transmitter and antenna data are required by operators of existing OFS systems who need to assure themselves that their systems will not experience undue interference from applied-for OFS stations. Rockwell notes that an affected party only has a 30-day window in which to evaluate the potential interference it may receive from an applied-for station, and, if necessary, to petition to deny the application of that station.[5] If the data in question is missing from the frequency engineering analysis, it could take as long as ten days to get the information from the applicant, according to Rockwell. With the 30-day clock running, Rockwell believes that operators of existing OFS systems who are unable to get the data in a timely fashion from applicants will have no recourse but to file petitions to deny against the applications for the proposed OFS stations. Rockwell believes this would occur since there would not be enough time remaining on the 30-day clock to resolve undue interference problems that could arise from the applied-for OFS system.

Decision

12. Having carefully considered the comments received in response to the *Notice*, we are adopting the proposal contained in the *Notice*. Thus, we will require that frequency engineering analyses include consideration of the technical characteristics of the transmitting equipment that an applicant proposes to use, as evidenced by the FCC ID number of the transmitter and the make and model numbers for all antennas. As the *Notice* proposed, we will also require each applicant to provide this information to the entity responsible for performing its frequency engineering analysis. The adoption of these rule amendments adequately reflects the importance of this technical information.

13. We disagree with those commenters who believe the proposed rule is not stringent enough because it does not explicitly require the FCC ID number of the transmitter and the make and model numbers for all antennas on the frequency engineering analysis. All applications for new or modified OFS stations must contain a frequency engineering analysis.[6] Our amended rule is unambiguous. It requires that the frequency engineering analysis include consideration of the transmitting equipment's technical characteristics as specifically indicated by the FCC ID number of the transmitter and the make and model numbers for all antennas. These requirements give us confidence that the microwave coordinators and others who maintain their own coordination data bases will be able to update their data bases.[7]

14. The Commission's staff has observed that since the introduction of the revised Form 402 application in January 1986, almost every frequency engineering analysis accompanying the revised form has contained the FCC ID number of the transmitter and the make and model numbers for all antennas.[8] This fact gives us confidence that there will be compliance with the rule we are adopting.

15. We find merit in the comments of API, which notes that given our decision to remove the transmitter and antenna information data elements from the Form 402: [t]he regulations proposed by the FCC will make available all relevant information to frequency coordinating entities and other interested parties. Between the data included on the Form 402 and the frequency analysis, complete information concerning a system's operation will continue to be available.[9] AFTRCC notes that our proposal specifically addresses the concerns of several microwave frequency coordinators regarding their ability to maintain and update their data bases adequately by the requirement that applicants provide transmitter and antenna data to the entity performing the frequency engineering analysis.

16. Several commenters express concern that though they can always have access to the transmitter and antenna data from applicants who are clients of their frequency coordination services, they may not have such access to the technical data of licensees and applicants who are not their clients. These parties believe the solution is for the Commission to maintain this technical information in its microwave data base or to place this information directly on each OFS license.

17. We believe that compliance with the rule we are adopting here along with the existing requirements of Section 94.15 will assure that all interested parties can obtain the FCC ID number of the transmitter and the make and model numbers of a system's antennas. Section 94.15(b) requires that OFS applicants and licensees cooperate fully in the exchange of technical information necessary to performing frequency engineering analysis.[10] We appreciate the concern that the 30-day public notice period represents a limited amount of time for an existing OFS system operator to determine transmitter and antenna information from an applicant whose system may potentially interfere with its own. However, we believe that applicants will be able to obtain the technical information they desire in a timely fashion. We note that during the past nine months, the period since we deleted the requirement for the transmitter and antenna information, not a single licensee or applicant has petitioned to deny an application appearing on public notice based on a claim that technical information regarding the transmitter and antennas of the applied-for system was not available.

18. We do not discount the assertions by many of the commenters that information concerning the FCC ID number of the transmitter and the make and model numbers of a system's antennas improves their ability to design private microwave systems and accommodate those systems in frequency-congested environments.[11] We do not, however, require this information for the processing of OFS applications since changes in a system's transmitters and antennas do not, taken by themselves, impact the interference potential of that system. The revised Form 402 is specifically designed to provide sufficient information for the Commission to determine the overall interference potential of an applicant's system. Applicants are required to provide on the form the technical data concerning the transmitter's frequency tolerance, antenna gain, effective radiated power, beamwidth, polarization and azimuth, as well as technical data concerning the

receiving antenna's gain, median received signal level, geographic location and height. Further, the information contained on the Form 402, together with the required supplemental information,[12] is sufficient to enable the design and engineering-in of an OFS system that complies with the technical requirements of Part 94.[13]

19. The rules governing OFS systems were designed so that the Commission, as well as the interested public, is informed whenever the interference potential of a particular OFS system changes. Section 94.45 (*Changes in authorized station requiring modification*) requires the submission of a modification application whenever any one or more of eleven situations occurs.[14] In each of these eleven situations, a change in the described technical parameter may cause a change in the overall interference potential of that authorized station.[15] Any change in a transmitter or antenna that would change the system's interference potential is thus brought to the attention of the Commission and the public.

20. Further, Section 1.962 of the rules requires that the Commission give public notice of OFS applications that substantially amend a pending application or applications that substantially change the facilities of an authorized station. Of the eleven situations that require submission of a modification application, eight also require that public notice be given of that modification application.[16] Thus, all interested parties have information available about important changes that impact the use of spectrum allocated for private operational-fixed microwave systems.

21. We also note that since the introduction of the revised Form 402 in January 1986, the speed of service for processing OFS applications has improved significantly.[17] The June 1982 version of the Form 402 was four pages long and included the data on the transmitter's FCC ID number and the make and model numbers of the system's antennas. Errors in the specification of the antennas' make and model numbers were among the most common and numerous defects on the application and the most time-consuming for the staff to check and correct. In those instances where data was incorrect and the applicant filed an amendment correcting it, the corrected application was not placed on public notice and the microwave frequency coordinators could not quickly correct the information in their data bases.[18] The removal of these data elements from the revised Form 402 along with the reduction of the length of the form to only two pages has speeded processing of OFS applications.

Conclusion

22. We are adopting the amendments to §94.15(b) proposed in the *Notice* in this proceeding. These amendments require frequency engineering analyses to include consideration of the technical characteristics of a system's transmitting equipment and antennas and require applicants to furnish this subject information to the frequency engineering firm or other entity performing the frequency engineering analysis. This information, in conjunction with the information contained on the revised Form 402, and other required supplemental information, is sufficient to enable the analysis of the overall interference potential of existing and proposed OFS systems in conformance with Part 94 technical standards. Further, our nine months' experience with the revised Form 402, along with the continuing operation of rules regarding technical cooperation, the placing of applications on public notice, and the submission of modification applications, assures us that interested parties will continue to have access to important information concerning the spectrum allocated for private microwave systems.

23. The rule amendment contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and has been found to impose a new or modified information collection requirement on the public. Implementation of any new or modified requirement will be subject to approval by the Office of Management and Budget as prescribed by the Act.

24. In the *Notice* adopted in this proceeding, the Commission certified that the rule changes proposed would not have a significant economic impact on a substantial number of small entities. Comments received in response to the*Notice* corroborate our determination of no significant economic impact. Accordingly, the Commission concludes that Section 603 and 604 of the Regulatory Flexibility Act do not apply to this proceeding. Therefore, there is no requirement for a final regulatory flexibility analysis.

Ordering Clause

25. Accordingly, IT IS ORDERED, that effective December 15, 1986, Part 94 of the Commission's Rules, 47 C.F.R. Part 94, IS AMENDED as set forth in the Appendix below. Authority for this action is found in Sections 4(i) and 303 of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i) and 303. IT IS FURTHER ORDERED, that this proceeding is TERMINATED.

26. For further information on this proceeding, contact Harold Salters of the Land Mobile and Microwave Division, Private Radio Bureau, Federal Communications Commission, Washington, D.C. 20554, telephone (202) 632-7597.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

APPENDIX

Part 94 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

PART 94 - PRIVATE OPERATIONAL -FIXED MICROWAVE SERVICE

The authority citation for Part 94 continues to read as follows:

AUTHORITY : Secs. 4, 303, 48 Stat., as amended, 1066, 1082; 47 U.S.C. 154, 303, unless otherwise noted.

In Section 94.15, paragraph (b) is amended to read as follows:

§94.15 Policy governing the assignment of frequencies.

* * * * *

(b) All applications for new or modified stations must contain an engineering analysis of the potential interference between the proposed facilities and previously authorized facilities and pending applications.

The application must contain as supplemental information:

(1) A certification that based upon frequency engineering analysis, the potential interference will not exceed that prescribed by the interference criteria in §94.63; or

(2) If the potential interference will exceed that prescribed by §94.63, a statement to the effect that all parties affected have agreed to accept the higher level of interference.

(3) In either case, the application must contain the names of the licensees and the call signs of the stations that were considered in conducting the engineering analysis. Further, applicants and licensees will be expected to cooperate promptly and fully in the exchange of technical information necessary to performing frequency engineering analysis and, in the event of technical differences, cooperate in resolving these differences. Engineering analyses prepared pursuant to this section shall include consideration of the technical characteristics of the transmitting equipment that an applicant proposes to use, including the FCC ID number of the transmitter and the make and model numbers for all antennas the applicant proposes to use. Applicants shall provide this information to the entities responsible for performing the frequency engineering analysis.

* * * * *

FOOTNOTES

[1] *Notice of Proposed Rule Making* (FCC 86-156), released April 14, 1986. A summary of the *Notice* along with the text of the proposed rule was published at 51 Fed. Reg. 15355 (April 23, 1986).

[2] FCC ID numbers are assigned by the Commission to transmitters which are granted FCC equipment authorization. Knowledge of the FCC ID number allows members of the microwave engineering community to ascertain quickly the transmitter's characteristics. In the same vein, knowledge of the antenna's make and model number (a number assigned by each antenna manufacturer) quickly allows the microwave engineering community to ascertain the antenna's performance characteristics.

[3] The pertinent part of our proposed rule reads:

> Engineering analyses prepared pursuant to this section shall include consideration of the technical characteristics of the transmitting equipment that an applicant proposes to use, as indicated by the FCC ID number of the transmitter and the make and model numbers for all antennas the applicant proposes to use. Applicants shall provide this information to the entities responsible for performing the frequency engineering analysis.

[4] MCI suggests that these changes be placed on Public Notice. SPI suggests criteria under which an OFS licensee could replace its transmitter only after applying to the Commission and receiving specific authorization. In those instances not requiring specific authorization, changes in the make and type of transmitting equipment would have to be indicated on the next renewal application or application for license modification. Similar requirements are suggested for changes to a system's antennas. SPI is concerned that changes to a system's transmitters and antennas may occur over time and not be retained in the Commission's files. SPI also fears that, over time, system operators may lose track of changes made to their system's transmitters and antennas and be unable to quickly produce this information for parties requesting it. SPI believes that this changing information must be kept accurate so that future applicants can ascertain the microwave environment.

[5] The filing of a petition to deny an OFS application is governed by 47 C.F.R. §1.962(g) which requires that a petition to deny any application subject to §1.962 be filed no later than 30 days after the date of the public notice listing the application, or substantial amendment to the application, as having been accepted for filing.

[6] The *Notice* proposed an editorial change to the first sentence of §94.15(b) to further clarify that all applications must contain a frequency engineering analysis. That proposed change we are now adopting amends the first sentence of the rule to read: "All applications for new or modified stations must contain an engineering analysis of the potential interference between the proposed facilities and previously authorized facilities and pending applications." Formerly, the first sentence of the rule read: "All applicants for new or modified stations shall make an engineering analysis of the potential interference between the proposed facilities and previously authorized facilities and pending applications."

[7] We note that the frequency engineering analysis is an integral part of each application for OFS facilities. Any party wishing to examine an OFS application at the Commission's Gettysburg, Pennsylvania office or to purchase a copy of an OFS application from the Commission's copy contractor, automatically receives the application Form 402, the accompanying frequency engineering analysis, data concerning all transmission paths, and any exhibit or supplement that was submitted with the application.

[8] The Commission's Public Notice of January 9, 1986, announcing the availability of the revised Form 402 specifically urged those who conduct frequency engineering analyses to include the transmitter and antenna data that are the subject of this proceeding on their coordination reports. In the language of the microwave community, a coordination report is the same as the frequency engineering analysis.

[9] API *Comments*, p. 5. UTC supports API's position. *See* UTC*Reply Comments*, p. 2.

[10] The technical cooperation provision of §94.15(b) states:

> Further, applicants and licensees will be expected to cooperate promptly and fully in the exchange of technical information necessary to performing frequency engineering analysis and, in the event of technical differences, cooperate in resolving these differences.

[11] Indeed, our Public Notice of January 9, 1986, which predates the *Notice* by three months, urged those responsible for the conduct of Part 94 frequency engineering analyses to include the subject transmitter and antenna information on their coordination reports. *Cf.* n.8,*supra*.

[12] Supplemental information required to be submitted with all applications is set forth at 47 C.F.R. §94.31. Section 94.31(a) specifically requires the submission, along with the application form, of the frequency engineering analysis described by §94.15.

[13] SPI notes that the subject transmitter and antenna data are an important component of EIA (Electronic Industries Association) Bulletin 10, which is used by many OFS licensees to analyze interference potential. The interference protection standards employed by EIA Bulletin 10 exceed those specified in

Part 94. Engineers seeking to design private microwave systems that go beyond the technical requirements of Part 94 may request information from licensees and applicants that will permit them to exceed those technical requirements. Such requests for information must be accommodated pursuant to the technical cooperation provision of §94.15(b).

[14] §94.15 requires the submission of a frequency engineering analysis with modification applications as well as applications for new stations.

[15] These 11 situations are: (1) any change in frequencies used; (2) any change in antenna azimuth; (3) any change in antenna beamwidth; (4) any change in antenna or passive repeater location greater than 1 second or which involves a requirement for special aeronautical study; (5) any change in antenna polarization; (6) any change in antenna height; (7) any change in the size of passive reflectors or repeaters associated with the facilities of an authorized station; (8) any increase in emission bandwidth beyond that authorized; (9) any change in the type of emission; (10) any change in authorized effective radiated power in excess of 3dB (a 2-to-1 ratio); (11) substitution of equipment having a different frequency tolerance.

[16] Section 1.962(c) sets out nine situations (two involve antenna location) that constitute a substantial amendment of an OFS application or station. They are: (1) any addition or change in frequency (except deletion of a frequency); (2) any change in antenna azimuth; (3) any change in antenna beamwidth; (4) any change in antenna location greater than 5 seconds; (5) any change in antenna location of less than 5 seconds but also involving a requirement for special aeronautical study; (6) any change in emission; (7) any increase in antenna height; (8) any increase in authorized power in excess of a 2 to 1 ratio; (9) any increase in emission bandwidth.

[17] In the period between October 1, 1985 and June 30, 1986, speed of service improved 14.5%. Though this improvement can be attributed to several factors, introduction of the revised form deserves much of the credit for the improvement.

[18] Since a change in transmitter or antenna was deemed minor, §1.962(b)(1) applied and the amended application was not placed on public notice. SPI urges that these changes not be labelled "minor" pursuant to §1.962(b)(1). As we observed in paragraphs 19 and 20, *supra*, any change in a transmitter or antenna that would impact a system's interference potential is disclosed by the submission of the modification application required by §94.45 and the operation of the public notice provisions of §1.962. Hence, we will not adopt SPI's proposal to attach greater importance to equipment changes involving transmitters and antennas.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-412

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Coalville, Utah)	RM-5491

NOTICE OF PROPOSED RULE MAKING

Adopted: October 6, 1986 **Released: November 6, 1986**

By the Chief, Policy and Rules Division:

1. The Commission considers herein a petition for rule making filed by Gene Guthrie ("petitioner") requesting the allotment of Channel 223A to Coalville, Utah, as that community's first FM service. Petitioner expressed his intention to apply for the channel, if allotted.

2. The channel can be allotted to Coalville in compliance with the Commission's minimum distance separation requirements with a site restriction of 10.9 kilometers (6.8 miles) southeast of the community in order to avoid a short spacing to Station KBLQ-FM, Channel 225, Logan, Utah.

3. In view of the fact that Coalville, Utah could receive its first FM channel, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Coalville, Utah	—	223A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. NOTE: A showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before December 29, 1986 and reply comments on or before January 13, 1987, and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Robert L. Olender, Esquire
Baraff, Koerner, Olender & Hochberg, P.C.
2033 M Street, N.W. - Suite 203
Washington, D.C. 20036-3355
(Counsel for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See, *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 Fed. Reg. 11549, published February 9, 1981.

7. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. However, members of the Public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. An *ex parte* contact is a message (spoken or written) concerning the merits of a pending rule making, other than comments officially filed at the Commission, or oral presentation required by the Commission. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Charles Schott
Chief, Policy and Rules Division

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial com-

ments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and reply Comments Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or persons acting on behalf of such parties must be made in written comments, reply comments. or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed.

Such comments and reply comments shall be accompanied by a certificate of service. .(See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street, N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

November 6, 1986

PUBLIC NOTICE

FCC ANNOUNCES 1987 MAXIMUM REIMBURSEMENT ALLOWED FOR AN AMATEUR VOLUNTEER ADMINISTERED EXAMINATION

The Commission announced today that effective January 1, 1986 the maximum allowable reimbursement for out-of-pocket costs for a volunteer administered amateur radio examination will be $4.37. This amount is based on a 1.87% increase in the Department of Labor Consumer Price index between October 1, 1985 and September 30, 1986.

Each volunteer examiner and each volunteer examiner coordinator may be reimbursed by examinees for out-of-pocket expense incurred in preparing, processing or administering examinations for amateur operator licenses above the Novice class. The amount of such reimbursement fee from any examinee for any one examination at a particular examination session, regardless of the number of examination elements taken, must not exceed $4.37.

This announcement is made pursuant to Section 97.36 of the Commission's Rules for the Amateur Radio Service.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

November 6, 1986

PUBLIC NOTICE

MAINTENANCE OF QUESTION POOLS FOR AMATEUR OPERATOR EXAMINATIONS TRANSFERRED TO VEC'S -- RULES TO BECOME EFFECTIVE

On August 4, 1986, the FCC adopted a Report and Order (FCC 86-343) in PR Docket No. 85-196 which transferred the maintenance of question pools for amateur operator examinations to the Volunteer Examiner Coordinators (VEC's). A written summary of this action was published in the Federal Register on August 28, 1986, 51 FR 30645.

Implementation of the information collection and record keeping requirements incident to the transfer of the question pools was contingent upon approval by the Office of Management and Budget (OMB). Approval has been received and the rules adopted in the proceeding may now become effective. Therefore, effective December 31, 1986, Part 97 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as set forth in the Appendix attached to the Report and Order in PR Docket No. 85-196.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No.86-414

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Williamsport, Pennsylvania)	RM-5468

NOTICE OF PROPOSED RULE MAKING

Adopted: October 9, 1986 **Released: November 6, 1986**

By the Chief, Policy and Rules Division:

1. The Commission has before it for consideration the petition for rule making filed by Bald Eagle Broadcast Associates ("petitioner") requesting the allocation of Channel 300A to Williamsport, Pennsylvania, as the community's third local commercial FM service. Petitioner states that it will apply for the channel, if allocated.

2. Channel 300A can be allocated to Williamsport in compliance with the Commission's minimum distance separation requirements. However, it conflicts with a proposal to allocate Channel 300B1 to Newberry, Pennsylvania, filed by Victor A. Michael, Jr. (RM-5374). In an effort to avoid a conflict between these two requests, the staff has conducted a channel search and found that Channel 238A can be allocated to Williamsport in compliance with the Commission's spacing requirements without requiring a site restriction. Therefore, we will substitute Channel 238A for consideration herein.

3. Canadian concurrence in the allocation must be obtained since Williamsport is located within 320 kilometers (200 miles) of the U.S.-Canada border.

4. We believe the public interest would be served by seeking comments on the allocation of Channel 238A to Williamsport since it could provide additional service to the community. Accordingly, we propose to amend the FM Table of Allotments, Section 73.202(b) of the Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Williamsport, Pennsylvania	274, 286	238A, 274, 286

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. NOTE: A showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before December 29, 1986 and reply comments on or before Janauary 13, 1987, and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Faith A. Smith
Vice President,
Bald Eagle Broadcast Associates
P.O. Box 1111
Williamsport, Pennsylvania 17703-1111

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See, *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 Fed. Reg. 11549, published February 9, 1981.

8. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau (202) 634-6530. However, members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. An *ex parte* contact is a message (spoken or written) concerning the merits of a pending rule making, other than comments officially filed at the Commission, or oral presentation required by the Commission. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Charles Schott
Chief, Policy and Rules Division

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(d)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the Notice of Proposed Rule Making to which this Appendix is attached.

2. Showings Required. Comments are invited on the proposal(s) discussed in the Notice of Proposed Rule Making to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. Cut-off Procedures. The following procedures will govern the consideration of filings in this proceeding. (a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments.

(See Section 1.420(d) of the Commission's Rules.) (b) With respect to petitions for rule making which conflict with the proposal(s) in this Notice, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket. (c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. Comments and Reply Comments; Service. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the Notice of Proposed Rule Making to which this Appendix is attached. All submissions by parties to this proceeding or persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied' by a certificate of service. .(See Section 1.420(a), (b) and (c) of the Commission s Rules.)

5. Number of Copies. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, brief r other documents shall be furnished the Commission.

6. Public Inspection of Filings. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street, N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-415

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Conway, New Hampshire)	RM-5373

NOTICE OF PROPOSED RULE MAKING

Adopted: October 7, 1986 **Released: November 6, 1986**

By the Chief, Policy and Rules Division:

1. The Commission has before it for consideration the petition for rule making filed by Pemigewasset Broadcasters, Inc. ("petitioner") requesting the allocation of Channel 289A to Conway, New Hampshire, as the community's second local FM service. Petitioner states that it will apply for the channel, if allocated.

2. In another proceeding, Channel 289A has been allocated to Campton, New Hampshire (MM Docket 85-315, 51 Fed. Reg. 23763, published July 1, 1986). The Conway and Campton proposals are mutually exclusive based on the mileage separation requirements since the communities are only 45 kilometers apart instead of the 105 kilometers required for co-channel Class A allotments. In order to permit consideration of allotments for both communities, we have determined that an alternate channel is available for Conway. Our engineering study finds that Channel 283A can be allocated to Conway in compliance with the Commission's minimum distance separation and other technical requirements with a site restriction of at least 4.2 kilometers (2.6 miles) southeast to avoid a short spacing to Station CFNI-FM, Channel 284A, Coaticook, Quebec, Canada. Therefore, Channel 283A will be substituted for consideration herein.

3. Canadian concurrence in the allocation is required since Conway is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

4. In view of the fact that the proposed allocation could provide Conway with its second local FM service, the Commission proposes to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Conway, New Hampshire	228A	228A, 283A

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. NOTE: A showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allocated.

6. Interested parties may file comments on or before December 29, 1986, and reply comments on or before January 13, 1987, and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, as follows:

Marvin Rosenberg, Esq.
Thomas S. Walsh, Esq.
Fletcher, Heald & Hildreth
1225 Connecticut Avenue, N.W., Suite 400
Washington, D.C. 20036
(Counsel to petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See,*Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making* to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules, 46 Fed. Reg. 11549, published February 9, 1981.

8. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. However, members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. An *ex parte* contact is a message (spoken or written) concerning the merits of a pending rule making, other than comments officially filed at the Commission, or oral presentation required by the Commission. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Charles Schott
Chief, Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(d)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required* . Comments are invited on the proposal(s) discussed in the Notice of Proposed Rule Making to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former plead-

ings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut -off Procedures* . The following procedures will govern the consideration of filings in this proceeding. (a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.) (b) With respect to petitions for rule making which conflict with the proposal(s) in this Notice, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket. (c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments* ; *Service* . Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies* . In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street, N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-416

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Keokuk, Iowa)	RM-5112

NOTICE OF PROPOSED RULE MAKING

Adopted: October 15, 1986 Released: November 6, 1986

By the Chief, Policy and Rules Division:

1. Before the Commission for consideration is a petition for rule making filed by W. Russell Withers, Jr. ("petitioner"), licensee of Station KOKX(FM), Channel 237A, Keokuk, Iowa, requesting the substitution of FM Channel 290C2 for Channel 237A and modification of its license to specify operation on the Class C2 channel.

2. We believe the proposal warrants consideration in view of the expressed desire for a wider coverage area FM station to serve the public interest. A staff engineering study reveals that the proposed allotment of FM Channel 290C2 can be made in compliance with the minimum distance separation requirements with a site 15.8 kilometers (9.8 miles) southwest of Keokuk, Iowa. The site restriction is necessary to avoid short-spacing Station WWCT(FM), Channel 289B, Peoria, Illinois.

3. In accordance with our established policy, we shall propose to modify the license of Station KOKX(FM) to specify operation on FM Channel 290C2. However, since this is not an adjacent channel proposal, should another party indicate an interest in the Class C2 allotment, the modification may not be implemented unless an additional equivalent channel is allotted. See *Modification of FM and TV Station Licenses* , 98 F.C.C. 2d 916 (1984) and see 1.420(g) of the Commission's Rules.

4. Accordingly, in order to provide Keokuk, Iowa, with its first wide coverage area FM station, the Commission proposes to amend the FM Table of Allotments, Section 73.202(b) of the Rules, with regard to the community listed below, as follows:

City	Present	Proposed
Keokuk, Iowa	237A	290C2

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. NOTE: A showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before December 29, 1986 and reply comments on or before January 13, 1987, and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

William P. Bernton, Esq.
1875 Eye Street, N.W. - Suite 1050
Washington, D.C. 20006

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See,*Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making* to Amend Sections 73.2(b). 73.504 and 73.606(b) of the Commission's Rules, 46 Fed. Reg. 11549, published February 9, 1981.

8. For further information concerning this proceeding, contact D. David Weston, Mass Media Bureau (202) 634-6530. However, members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. An *ex parte* contact is a message (spoken or written) concerning the merits of a pending rule making, other than comments officially filed at the Commission, or oral presentation required by the Commission. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Charles Schott
Chief, Policy and Rules Division

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(d)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the Notice of Proposed Rule Making to which this Appendix is attached.

2. Showings Required. Comments are invited on the proposal(s) discussed in the Notice of Proposed Rule Making to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. Cut-off Procedures. The following procedures will govern the consideration of filings in this proceeding. (a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.) (b)

With respect to petitions for rule making which conflict with the proposal(s) in this Notice, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket. (c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. Comments and Reply Comments; Service. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the Notice of Proposed Rule Making to which this Appendix is attached. All submissions by parties to this proceeding or persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied' by a certificate of service. .(See Section 1.420(a), (b) and (c) of the Commission s Rules.)

5. Number of Copies. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, brief r other documents shall be furnished the Commission.

6. Public Inspection of Filings. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street, N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No.86-417

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Window Rock, Arizona)	RM-5445

NOTICE OF PROPOSED RULE MAKING

Adopted: October 15, 1986 Released: November 6, 1986

By the Chief, Policy and Rules Division:

1. Before the Commission for consideration is a petition for rule making filed on behalf of Western Indian Ministries, Inc. ("petitioner") [1] requesting the allotment of Class C Channel 241 to Window Rock, Arizona, as that community's second local FM broadcast service. [2] Petitioner states that it will apply for the channel, if allotted.

2. A staff engineering study has determined that Channel 241 can be allotted to Window Rock in conformity with the minimum distance spacing requirements of Section 73.207 of the Commission's Rules.

3. In view of the fact that the proposal could provide an additional local FM service to Window Rock, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules with regard to that community, as follows:

	Channel No.	
City	Present	Proposed
Window Rock, Arizona	276A	241, 276A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. NOTE: A showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before December 29, 1986 and reply comments on or before January 13, 1987, and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Mark E. Fields, Esq.
Miller & Fields, P.C.
P.0. Box 33003
Washington, D.C. 20033
(Counsel for Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See,*Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 735.606(b) ofthe Commission's Rules*, 46 Fed. Reg. 11549, published February 9, 1981.

7. For further information concerning this proceeding, contact Nancy V. Joyner, Mass Media Bureau, (202) 634-6530. However, members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. An *ex parte* contact is a message (spoken or written) concerning the merits of a pending rule making, other than comments officially filed at the Commission, or oral presentation required by the Commission. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Charles Schott
Chief, Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(d)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the Notice of Proposed Rule Making to which this Appendix is attached.

2. Showings Required. Comments are invited on the proposal(s) discussed in the Notice of Proposed Rule Making to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. Cut-off Procedures. The following procedures will govern the consideration of filings in this proceeding. (a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.) (b) With respect to petitions for rule making which conflict with the proposal(s) in this Notice, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket. (c) The filing of a

counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. Comments and Reply Comments; Service. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the Notice of Proposed Rule Making to which this Appendix is attached. All submissions by parties to this proceeding or persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied' by a certificate of service. .(See Section 1.420(a), (b) and (c) of the Commission s Rules.)

5. Number of Copies. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, brief r other documents shall be furnished the Commission.

6. Public Inspection of Filings. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street, N.W., Washington, D.C.

FOOTNOTES

[1] Petitioner is the licensee of daytime-only AM Station KHAC, Window Rock, Arizona.

[2] Channel 276A was allotted to Window Rock in MM Docket No. 84-231, 50 FR 3514, January 25, 1985 However, as announced in the Public Notice in that proceeding, 50 FR 19263, May 7, 1985, Channel 276 was selected as the 66th in sequential order for which applications will ultimately be accepted for filing during a pre-announced "window period."

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-418

Amendment of Section 73.202(b) Table of Allotments, FM Broadcast Stations. (Bedford, Pennsylvania)	RM-5494

NOTICEOF PROPOSED RULE MAKING

Adopted: October 15, 1986 Released: November 6, 1986

By the Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making submitted by Cessna Communications, Inc. ("petitioner") requesting the allocation of Channel 298A to Bedford, Pennsylvania, as the community's second local FM service. Petitioner states that it will apply for the channel, if allocated.

2. Channel 298A can be allocated to Bedford in compliance with the Commission's minimum distance separation and other technical requirements. No site restriction is necessary. However, concurrence by the Canadian Government must be obtained since Bedford is located within 320 kilometers (200 miles) of the U.S.-Canada border.

3. We believe the public interest would be served by proposing the allocation of Channel 298A to Bedford, Pennsylvania, as requested, since it could provide the community with its second local FM service. Accordingly, we propose to amend the FM Table of Allotments, Section 73.202 (b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Bedford, Pennsylvania	265A	265A, 298A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. NOTE: A showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before December 29, 1986 and reply comments on or before January 13, 1987, and are advised to read the Appendix for the proper procedures. Additionally. a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Robert A. Marmet, Esq.
Harold K. McCombs, Jr., Esq.
Marmet and McCombs Professional Corporation
1822 Jefferson Place, N.W.
Washington, D.C. 20036
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings , to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See, *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 Fed. Reg. 11549, published February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau (202) 634-6530. However, members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. An *ex parte* contact is a message (spoken or written) concerning the merits of a pending rule making, other than comments officially filed at the Commission, or oral presentation required by the Commission. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Charles Schott
Chief, Policy and Rules Division

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(d)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the Notice of Proposed Rule Making to which this Appendix is attached.

2. Showings Required. Comments are invited on the proposal(s) discussed in the Notice of Proposed Rule Making to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. Cut-off Procedures. The following procedures will govern the consideration of filings in this proceeding. (a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.) (b) With respect to petitions for rule making which conflict with the proposal(s) in this Notice, they will be considered as comments in the proceeding, and Public Notice to

this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket. (c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. Comments and Reply Comments; Service. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the Notice of Proposed Rule Making to which this Appendix is attached. All submissions by parties to this proceeding or persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied' by a certificate of service. .(See Section 1.420(a), (b) and (c) of the Commission s Rules.)

5. Number of Copies. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, brief r other documents shall be furnished the Commission.

6. Public Inspection of Filings. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street, N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

PERSONAL TELEPHONE COMPANY OF SAVANNAH, INC. File No. 28944-CL-P-155-A-86

For a construction permit to establish a cellular system operating on Frequency Band A in the Domestic Public Cellular Radio Telecommunications System for the Savannah, Georgia MSA

MEMORANDUM OPINION AND ORDER

Adopted October 31, 1986; Released: November 6, 1986

By the Common Carrier Bureau:

A. Introduction

1. Northern Illinois Cellular Communications, Inc. (NICCI)[1] has filed a petition to dismiss or deny the above-captioned application for the non-wireline construction permit for the Savannah, Georgia Metropolitan Statistical Area (MSA). The application of Sheila Leibsohn was selected first in the lottery held for the market on May 28, 1986. The Commission announced Sheila Leibsohn as the tentative selectee in *Public Notice*, Report No. CL-86-207, released June 24, 1986. On July 25, 1986, the tentative selectee submitted a Section 1.65 amendment reflecting the formation of a corporation called Personal Telephone Company of Savannah, Inc. to hold the construction permit and operating license for the Savannah nonwireline cellular system. The petition is opposed by Personal Telephone Company of Savannah, Inc. (Personal Telephone).

B. Technical Qualifications

2. NICCI alleges that Personal Telephone's technical proposal fails to meet the Commission's "letter perfect" standard. It argues that Personal Telephone entered obsolete emission designators in question 33(j)(3) of Form 401, Schedule B. It cites *Revision and Update of Part 22 of Public Mobile Radio Service Rules, Order on Reconsideration*, 58 Rad. Reg. 2d (P&F) 1051, 1058 (1985) and *Public Notice*, Mimeo No. 0729, released November 5, 1985, which it characterizes as indicating that the "old" emission designators no longer may be used.

3. Second, NICCI contends that the applicant is not technically qualified to become a Commission licensee because Cell 1 of the proposed system does not have an adequate number of antennas to serve the proposed number of channels for the cell. It asserts that equipment limitations prevent the use of only one antenna to serve 19 channels and require a minimum of two antennas.

4. In its reply Personal Telephone notes that its engineering consultant, whose affidavit is attached, avers that he was advised by the Commission staff that either set of emission designators was acceptable and that the two sets of designators are functionally equivalent. It asserts that a Commission engineer processing the application would know exactly which channels and forms of emission are proposed on the basis of the emission designators set forth in Personal Telephone's application. It thus concludes that no incorrect substantive information was provided to the Commission by virtue that Personal Telephone specified the old emission designators in its application.

5. Moreover Personal Telephone responds that its application proposes to use two frequency sets in Cell 1, and that the application also states that one transmit antenna is used for each frequency set. Thus it concludes that when the two parts of Exhibit 10 of its application are read together the inescapable conclusion is that Personal Telephone will use two antennas for the two frequency sets it plans to use in Cell 1, and that the Commission has all the information necessary to permit it to evaluate Personal Telephone's design of Cell 1.

Discussion

6. *Emission Designators.* NICCI's argument that Personal Telephone has used obsolete emission designators is unpersuasive.[2] The November 5, 1985 public notice referenced in NICCI's pleading merely notified the public that the Mobile Services Division shortly would begin to issue authorizations with the new emission designators. The public notice, entitled "Use of New Emission Designators for Facilities Licensed *in the Public Land Mobile Service*" (emphasis added), stated that, "(i)t should be emphasized that the new system of emission designators simply represents a different method of describing emissions, and does not require any actual changes to a licensee's equipment." The public notice also referenced the Part 22 *Reconsideration Order* which amended Section 22.104(a) of the rules. It noted that the rule amendments provide that the new designators automatically will be included in the station authorization, provided type-accepted equipment is employed. Thus, licensees need not file amendments to their licenses merely to incorporate the new method of designation. Further, although Form 401, which is utilized for cellular as well as non-cellular filings, calls for entry of emission designator data, this data is not incorporated into cellular construction permits and licenses as it is for non-cellular applications. Finally, the staff of the Mobile Services Division consistently has advised members of the public that either set of designators is acceptable.

7. *Number of antennas.* NICCI's assertion that Personal Telephone is technically unqualified to be a Commission licensee is also without merit. The Commission's rules do not require a specific ratio of antennas to channels in a cell. Thus, even if Personel Telephone were proposing only one antenna in Cell 1, there would be no violation of a Commission rule. However, Personal Telephone is not proposing only one antenna. Its Exhibit 10 expressly provides both that 1) "one transmit antenna will be used for each frequency set," and 2) for year 1 of operation, two frequency sets – A1 with 15 channels and C1 with 4 channels – will be used in its Cell 1. Therefore, Personal Telephone's Exhibit 10 clearly demonstrates that Cell 1 in year 1 of operation will use two transmit antennas. Thus, NICCI's allegation that the tentative selectee is technically unqualified to become a Commission licensee because it will not use two transmit antennas is unsupported.

8. After careful review of the application and associated pleadings, we find Personal Telephone Company of Savannah, Inc. legally, technically and otherwise qualified to become a Commission licensee.

C. Ordering Paragraphs

9. Therefore, for the foregoing reasons, IT IS ORDERED, That the application of Personal Telephone Company of Savannah, Inc., File No. 28944-CL-P-155-A-86, IS GRANTED.

10. IT IS FURTHER ORDERED, That the Petition to Dismiss or Deny filed by Northern Illinois Cellular Communications, Inc. IS DENIED.

11. This order is issued under Section 0.291 of the Commission's rules and is effective on its release date. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order. *See Section 1.4(b)(2).*

Kevin J. Kelley

Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] NICCI is an applicant for the non-wireline cellular authorization for Savannah, Georgia. Although not ranked within the top ten applicants selected at lottery, NICCI entered into a settlement and option agreement with the Cellular America settlement alliance. The second ranked nonwireline applicant in the Savannah, Georgia market also joined this alliance.

[2] The application, at question 33(j)(3) of Form 401, Part B, contains the entry, "40F9/40F9Y" to designate respectively the cellular voice channels and cellular signalling channels. The new emission designators are respectively 40K0F3E and 40K0F1D. As noted in the affidavit of Personal Telephone's engineer, the new method of designation has no bearing on the type of equipment used because the manufacturer of the equipment must have ensured that the equipment meets the Commission's type-acceptance requirements.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 86-63

In the Matter of

Amendment of Part 97 of the Commission's Rules to Provide for Examination Credit for Written Examination Elements above the Novice Class. RM-4991

REPORT AND ORDER

Adopted: October 6, 1986 ; Released: November 7, 1986

By the Commission:

Introduction

1. In the *Notice of Proposed Rule Making* (*Notice*) in this proceeding, 51 FR 6446, February 24, 1986, we proposed to amend our rules to allow re-examination credit for written elements which may have been passed during an otherwise unsuccessful amateur operator examination. The current rules only allow credit for telegraphy elements.

2. All amateur operator license examinations consist of telegraphy and written elements. At present an applicant must pass the telegraphy element before taking a written element. Thus, an applicant can pass the telegraphy element and fail the written element, but not vice versa. Credit is allowed for a telegraphy element passed in this manner when re-examination takes place within one year. It appears that it may sometimes be desirable to administer the written element before the telegraphy element, or to allow an applicant who has failed the telegraphy element to attempt the written element(s). For this reason we proposed to also allow credit for written elements at re-examination.

3. We also sought comment on several related matters: (1) whether to extend the use of certificates of successful completion of examination (CSCE's) to written elements; (2) whether to require a candidate to present the volunteer examiners (VE's) with an application document before examination; and (3) whether volunteer-examiner coordinators (VEC's) should be the repository of pending applications.

Comments

4. We received twelve comments. Five are from VEC's: American Radio Relay League, Inc. (ARRL), W5YI Report (W5YI), Anchorage VEC Board (Anchorage), Milwaukee Radio Amateurs Club, Inc. (Milwaukee), and Sunnyvale VEC ARC (Sunnyvale). Seven comments are from individuals: Robert A. Scupp, Richard S. Moseson, William G. Welsh, Larry W. Garens, Harley Gabrielson, Howard Wakefield Holley and Shannon Cisco.[1]

5. The comments support the written element credit proposal. ARRL, Anchorage, and Welsh state that both the telegraphy and the written elements should be treated the same for purposes of examination credit. Garens states that it would would remove unnecessary burdens on VEC's, VE's and candidates. Scupp comments that it would provide the latitude to comfortably prepare for an examination element.

6. The comments express concern about possible misuse of the CSCE if it is extended to written elements. Suggestions include standardization of the CSCE form and the establishment of verification procedures. W5YI, Garens and Moseson see no need for the candidate to present the VE's with an FCC Form 610 application document before the examination. Moseson states that some type of document is necessary in order to get relevant information but that it need not be FCC Form 610. ARRL, Gabrielson and Scupp favor continued reliance on the FCC Form 610 for this purpose. ARRL states: "The form 610 must also be presented even when there will not be a license upgrade because the form necessitates the applicant's affirmation, under oath, that his or her representations, on which the VE, VEC, and the Commission may rely, are true and correct."

7. Regarding our statement in the *Notice* that because of the administrative burden we do not wish to receive an application until the candidate passes the required elements, ARRL, WY5I, Anchorage, Gabrielson and Scupp state that neither the FCC nor VEC's should be the repository of "working" applications. The general consensus is that the responsibility for the document should belong to the applicant until all requirements are fulfilled.

Discussion

8. The present method of first requiring successful completion of the telegraphy examination element reflects the former needs of the FCC when we administered examinations. Under the volunteer examination system, it is clear that there is no reason to disallow credit for a written element passed within the previous one year. If VE's find it useful and convenient to administer a written element to an applicant who has failed the telegraphy element, or to administer written elements before telegraphy elements, they should be able to do so.

9. As to the matter of possible CSCE misuse, we concur with the statement of Welsh: "Either the certificate is a valid document in both instances, or it should not be valid in either case." We have no substantial evidence of any significant misuse of the CSCE's for telegraphy element credit. It would be inappropriate to adopt differing rules on the basis of an opposite presumption for written elements.

10. Moseson urges that examination credit should also be extended to those awaiting the arrival of their first FCC license, especially those who have passed Elements 1(A) and (2) under the Novice VE system. Assuming such candidates would have no CSCE, Moseson recommends they be given examination credit on the basis of a photocopy of their pending application. This recommendation has merit, and in fact resolves an ambiguity. While Section 97.25(b) appears to require a VE who administers Elements 1(A) or (2) under the Novice VE system to issue a CSCE, Section 97.28(e) does not. VE's administering Novice operator examinations are not coordinated by a VEC and generally do not have access to CSCE forms.

11. In the *Notice* we said that we do not wish to receive an application until a candidate completes the required elements. This avoids unnecessary administrative burden. The ARRL, WY5I, Anchorage, Gabrielson and Scupp

stated that neither the FCC nor VEC's should be the repository of "working" applications. The general consensus was that the responsibility for the document should belong to a candidate until all requirements are fulfilled.

Decision

12. We are adopting rules to allow examination credit for all amateur operator written and telegraphy examination elements. These provisions simply extend the use of the CSCE to written elements. We are amending the rules to clarify that a VE administering an examination under the Novice VE system does not issue a CSCE. Instead, we are adopting new rules consistent with Moseson's recommendations to allow examination credit for Elements 1(A) and (2) to a candidate who presents the administering VE's with a photocopy of a pending application which indicates the person has qualified for a Novice operator license.

13. The FCC Form 610 serves as the application for examination and – where the requisite elements have been successfully completed – as the application for the license. There is a need for both uses and it does not appear there is a satisfactory substitute. Therefore, we will not remove the rules requiring submission of an FCC Form 610 before each examination.

14. It would be impractical for a VEC to hold an application pending a candidate's passing of additional elements. Therefore, we will continue to require the administering VE's and the coordinating VEC to review and forward an application only when the candidate has completed all elements required for the license.

Conclusion

15. The rules adopted herein require modification of FCC Form 610. Specifically, they require new VE Certifications and new instructions to applicants and VE's in Section II. These rule changes have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose a new or modified information collection requirement on the public. Implementation of any new or modified requirement will be subject to approval by the Office of Management and Budget as described by the Act. A copy of the modified FCC Form 610 we are adopting has been placed in the docket file associated with this proceeding. It is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 Street, N.W., Washington, D.C.

16. In accordance with Section 605 of the Regulatory Flexibility Act of 1980 (5 U.S.C. § 605). we certify that these rule changes will not have a significant economic impact on a substantial number of small entities, because these entities may not use the Amateur Radio Service for commercial radio communications. (See 47 C.F.R. § 97.3(b)).

17. Accordingly, IT IS ORDERED that under the authority contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended (47 U.S.C. §§ 154(i) and 303(r)), Part 97 of the Commission's rules is amended as set forth in the attached Appendix. These rule changes are effective December 15, 1986, contingent upon Office of Management and Budget approval of the changes to FCC Form 610.

18. IT IS FURTHER ORDERED, subject to the approval of the Office of Management and Budget, that FCC Form 610 is revised as set forth in the docket file associated with this proceeding.

19. For further information about this proceeding contact John J. Borkowski, Private Radio Bureau, at (202) 632-4964.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

APPENDIX

Part 97 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 97 continues to read: 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154,303. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-155, 301-609, unless otherwise noted.

2. Paragraph (b) of Section 97.25 is revised to read:

§ 97.25 Examination credit.

* * * * *

(b) Upon presentation of a certificate of successful completion of an examination (see Section 97.28(e)) for any examination element examiners shall give applicants for amateur radio operator licenses examination credit for any element that has been successfully completed within the previous 365 days. Examiners shall give applicants credit for Elements 1(A) or 2 upon presentation of a photocopy of FCC Form 610 which has been submitted to the FCC indicating the applicant has qualified for the Novice operator license within the previous 365 days.

* * * * *

3. Paragraph (e) of Section 97.28 is revised to read:

§ 97.28 Examination administration.

* * * * *

(e) A certificate of successful completion of an examination will be issued by the examiners to an applicant who successfully completes an examination element coordinated by a VEC under Subpart I. A certificate is valid for a period of 365 days from the date of its issuance.

* * * * *

FOOTNOTES

[1] Holley proposes Amateur Extra operator examinations be made easier for persons 65 years of age or older. Cisco seeks reconsideration of the status of the former Technician (C) and Conditional operator licenses. Neither Holley's nor Cisco's comments deal with issues within the scope of this proceeding.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 85-388

Amendment of the Commission's Rules for Rural Cellular Service — RM-5167

FURTHER NOTICE OF PROPOSED RULE MAKING

Adopted October 16, 1986; Released November 7, 1986

By the Commission:

1. This Notice of Proposed Rule Making (Notice) proposes to amend the Commission's current cellular rules for Rural Service Areas (RSAs) in several fundamental respects. We propose to prohibit prefiling, post-filing and post-grant partial settlements among competing non-wireline cellular applicants to serve RSAs. This proposal would prohibit applicants from holding or acquiring any interest in a competing application where there is no full market settlement except for the ownership of stock interest in publicly-traded companies permitted under the Commission's current rules. We further propose to prohibit the sale, transfer, assignment or other alienation of any interest in a cellular application, permit or license to offer service to RSAs until the facility has been placed in operation. While we have declined to impose stringent restrictions on cellular applicants or licensees in the past, we now believe such a restriction with one exception proposed herein would be in the public interest and are seeking comment on adopting such rules to govern applicants and licensees in RSAs. This is part of our ongoing effort to screen out insincere applications which have delayed the provision of service to the public.

2. *Partial Seulements and Multiple Ownership.* In *Cellular Louery Reconsideration Order* (*Reconsideration Order*)[1], the Commission declined to prohibit the filing of non-wireline applications for markets beyond 120 by persons who had entered into pre-filing settlement agreements. After a lengthy analysis, the Commission concluded that wireline and non-wireline applicants could "enter into settlement agreements, either before or after filing,"[2] but that non-wireline applicants would no longer be entitled to cumulative lottery chances as a result of the settlement. The Commission noted that, "In this way, applicants may still exercise their business judgment to effectuate sensible joint ventures or partnerships without the application abuses experienced in markets 91-120."[3]

3. Based upon our experience with non-wireline applicants in previous markets, it appears that the application abuses experienced in markets 91-120 were not rectified by the steps we took and the elimination of cumulative chances in the lottery.[4] We have been inundated with applications and filings related to partial settlements in the markets beyond the top-120. We are concerned that by permitting such partial settlements we have encouraged speculative filings by insincere applicants, and that the resulting large number of applications and settlements has squandered Commission time and resources, delayed cellular processing and slowed cellular service to the public, without providing a countervailing administrative or public benefit. For these reasons, we propose to prohibit all prefiling, post-filing and post-grant partial settlements among competing non-wireline applicants who propose to serve RSAs. Full settlements would still be permitted since they serve the public interest by simplifying and expediting the licensing process. However, we do not anticipate that non-wireline applicants will realistically be able to effectuate full settlements.

4. In the *Cellular Louery Rule Making* , 98 F.C.C.2d 175, 215-219 (1984), *modified, Reconsideration Order, supra,* note 1, the Commission considered limiting ownership in multiple competing markets and adopted a rule which prohibits parties from having an ownership interest in more than one application for the same MSA, NECMA or RSA market "except that interests of less than 1% will not be considered." See Section 22.921 of the Commission's rules.

5. In our desire to rid ourselves of the abuses mentioned in paragraph three above, we also propose to prohibit wireline and non-wireline applicants from holding or acquiring *any* interest, even that which is less than 1% in the same RSA, except for permissible interests in publicly-traded corporations.[5] Our experience in processing applications below the top-120 has shown that the 1% exception has generally been used as part of a post-filing and prelottery partial settlement process. Since we have proposed to prohibit such partial settlements, we are not persuaded that the 1% rule effectuates any public purpose except to serve as a possible tool for abuses of our licensing processes.

6. *Transfer.* In the *Cellular Lottery Rule Making, supra,* at 217, the Commission amended Section 22.920 of the Commission's rules to permit the sale of a construction permit and a top-30 license operated less than a year only after a showing that the transferor is not speculating in cellular licenses. Cellular licenses awarded by lottery, however, are transferable after construction without regard to a minimum license holding period. The Commission has permitted holders of construction permits to trade its ownership interest in a construction permit for a cellular system in one market for an equal interest in another cellular market. The Commission noted at para. 77, *supra,* that this approach "best balances the public interest in efficient use of the spectrum through free transferability of licenses with a deterrent for insincere applicants to speculate in unbuilt or newly built facilities."

7. The ability to sell, trade or transfer cellular licenses has resulted in abuses of the Commission's licensing processes by insincere and speculative applicants and has encouraged applicants who have no intention of constructing and operating a cellular system to file applications in hopes of making a profit by selling their permits or licenses. Further, the large number of transfers sought by applicants, permittees and licensees has wasted the Commission's time and resources, delayed the processing of applications and, thereby, slowed service to the public without an offsetting administrative or public benefit. Thus, we propose to prohibit the sale, transfer, assignment or other alienation of any interest in a cellular application, permit or license to offer service to RSAs until the facility has been placed in operation. However, we propose to allow barters and transfers of interests in construction permits in partial or whole RSAs. We believe that allowing such exchanges may permit the consolidation of certain contiguous RSAs to form more economically viable service areas than would result from the operation of

the random selection process alone. We believe this exception will provide the expeditious and economical initiation of cellular service to the public without vitiating our objectives. However, we emphasize that it is not our intention to allow the barter process to be used to subvert our policy that requires each lottery winner to construct cellular facilities and we specifically invite comment on the latitude that should be allowed lottery winners engaging in the barter and exchange process. These rule changes should deter insincere applicants from speculating in unbuilt or new facilities, and should guarantee that applications which are filed reflect an applicant's genuine intention to construct and operate the proposed cellular facility.

8. Finally we are taking this opportunity to deal with three procedural matters concerning the filing of cellular radio applications. First we are proposing that the rules be amended to codify our policy that cellular radio applications may only be filed on the dates specified by the Commission notwithstanding any other rule provision. *Cellular Communications Systems* (Cellular Reconsideration Order).[6] Second we are requesting comment on our existing policy that allows only licensees and permittees to file for authorization to serve those areas that are outside the existing CGSA but within the MSA. *New Orleans, CGSA, Inc.*, FCC 85-209, 35773, released May 6, 1985; *Lake Bridge Telephone Company*, FCC 85-208, 35772, released May 6, 1985; *Cellular Lottery Rule Making, supra*, at n. 81. In particular we are requesting comment on whether non-permittees should be allowed to file to serve such areas when the permittee or licensee files, or at some fixed period after the construction permit is granted. Third, effective on the adoption of this *Notice* and until such time as the previous issue is resolved we will not accept any application proposing to serve areas not included in existing or proposed CGSAs.

Regulatory Flexibility Act - Initial Analysis.

9. *Reasons for action and objectives.* The proposed action promotes efficient and expedient authorization of cellular licenses in the RSAs of the country. It will also help eliminate abuses of our licensing processes and reduce possible trafficking in cellular applications and licenses.

10. *Legal Basis.* The authority for this proposed rule making is contained in Sections 1, 4(i), 301, and 303 of the Communications Act of 1934, as amended.

11. *Small Entities affected and potential impact.* Although small exchange carriers will be prohibited from trafficking in cellular applications or licenses, the proposed action will have no measurable negative impact on small entities that propose to offer cellular service to rural communities. Moreover, by helping to eliminate insincere or speculative applications, the proposed rules will encourage the entry of and improve the chances of *bona fide* small businesses in the cellular licensing process. The same carriers may also benefit from more expeditious licensing of RSA areas.

12. *Reflect federal rules which overlap, duplicate or conflict with this action.* As discussed in this *Notice*, the proposed rules alter the Commission's existing rules regarding partial settlements, ownership interests and transfers of cellular applications or licenses for RSAs. Other than the specific rules changed, to our knowledge there is no federal rule that conflicts with, duplicates, or overlaps the proposal made in this *Notice*.

13. *Reporting, record - keeping and compliance requirements.* None.

14. *Specific alternatives* that could accomplish the same objectives. None.

15. Comments on all aspects of the analysis and proposed rule (see Appendix A) of this Notice are encouraged. Interested persons are invited to submit comments in accordance with Section 1.419 of the Commission's Rules , 47 CFR Section 1.419. Comments must be filed by December 22, 1986 and reply comments by January 8, 1987.

16. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* contacts are permitted from the time the Commission adopts a notice of proposed rule making until the time a public notice is issued stating that a substantive disposition of the matter is to be considered at a forthcoming meeting or until a final order disposing of the matter is adopted by the Commission, whichever is earlier. In general, an exparte presentation is any written or oral communication (other than formal written comments/pleadings and formal oral arguments) between a person outside the Commission and a Commissioner or a member of the Commission's staff which addresses the merits of the proceeding. Any person who submits a written *ex parte* presentation must serve a copy of that presentation on the Commission's Secretary for inclusion in the public file. Any person who makes an oral *ex parte* presentation addressing matters not fully covered in any previously-filed written comments for the proceeding must prepare a written summary of that presentation on the day of oral presentation. That written summary must be served on the Commission's Secretary for inclusion in the public file, with a copy to the Commission official receiving the oral presentation. Each *ex parte* presentation described above must state on its face that the Secretary has been served and must also state by docket number the proceeding to which it relates. See 47 C.F.R. Section 1.1231. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments, providing that such information or a writing indicating the nature and source of such information is placed in public file, and provided that the fact of the Commission's reliance on such information is noted in the Report and Order.

17. A copy of this Notice of Proposed Rule Making shall be sent to the Chief, Counsel of Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

APPENDIX A

Part 22 of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

Part 22 - Public Mobile Service

1. The authority citation continues to read:

Authority: Sections 4, 303, 48 Stat. 1066, 1082, as amended (47 U.S.C. 154, 303).

2. Section 22.6 is amended by adding paragraph (b)(3) to read as follows:

Section 22.6 Filing of applications, fees, and number of copies.

* * * * *

(b) * * *

(3) Notwithstanding any other rule provision of this Part, cellular radio applications may only be filed on the dates specified by the Commission.

* * * * *

3. Section 22.33 (b)(2) is revised to read as follows:

Section 22.33 Grants by random selection.

* * * * *

(b) * * *

(2) Markets Beyond the Top-120 and Rural Service Areas. In markets beyond the top-120 cellular modified Metropolitan Statistical Areas, the cumulative lottery chances described in paragraph (1) will be awarded to joint enterprises resulting from partial settlements among mutually exclusive wireline applicants only. Any joint enterprise resulting from a partial settlement among mutually exclusive non-wireline applicants for markets beyond the top-120 Metropolitan Statistical Areas will not be entitled to any cumulative lottery chances. Partial settlements among non-wireline applicants for Rural Service Areas are prohibited.

* * * * *

4. Section 22.921(b)(1) is revised to read as follows:

Section 22.921 Ownership in applications for cellular service for markets below the top-90.

* * * * *

(b) Markets beyond the top-120 and Rural Service Areas.

(1) General. Except as otherwise provided herein, no party may have an ownership interest, direct or indirect, in more than one application for the same MSA or NECMA market, except that interests of less than one percent will not be considered. For those areas outside MSA or NECMA markets, no wireline or non-wireline party may have an ownership interest, direct or indirect, in more than one application for the same Rural Service Area, including an interest of less than one percent, except as otherwise provided herein.

* * * * *

5. Part 22 is amended by adding a new Section 22.922 to read as follows:

Section 22.922 Transfers and assignments of applications, permits or licenses in Rural Service areas. (a) Notwithstanding any other section of this Part and except as provided in paragraph (b) below, the sale, transfer, assignment or other alienation of any cellular application, permit or license to offer service to Rural Service Areas is prohibited until the facility has been constructed and placed in operation. (b) Applicants who have construction permits in Rural Service Areas may barter and transfer the interests in such permits in partial or whole Rural Service Areas. These barters and transfers may occur soon as the applicants involved in the exchange have obtained a construction permit in a Rural Service Area.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

KLF ELECTRONICS, INC.,

Complainant,

v. File No. E-84-30

INDIANA BELL TELEPHONE CO., INC.,

Defendant.

NORTH AMERICAN
TELECOMMUNICATIONS
ASSOCIATION,

Complainant,

v. File No. E-85-26

INDIANA BELL TELEPHONE CO., INC.,

Defendant.

MEMORANDUM OPINION AND ORDER

Adopted October 22, 1986 ; Released November 7, 1986

By the Commission:

1. Before us is a petition filed by KLF Electronics, Inc. (KLF) seeking reconsideration of the Bureau's order denying its complaint against Indiana Bell Telephone Company, Inc. (Indiana Bell).[1] Also before us is one remaining issue in the complaint filed by the North American Telecommunications Association (NATA) against Indiana Bell.[2] In both the *NATA* and *KLF* complaints, the complainants allege that Indiana Bell is unlawfully applying an intrastate credit for Centrex[3] customers to offset federal end user subscriber line charges (SLC), which results in pricing SLC for Centrex lines on a trunk equivalency basis.[4] KLF contends that the Bureau erred in finding this practice lawful. Indiana Bell argues in both cases that its pricing of Centrex is appropriate and notes that it was approved by the Indiana Public Service Commission under the relevant state tariff for this intrastate service. For the reasons given below, we will deny KLF's petition for reconsideration and dismiss the remaining issue in NATA's complaint against Indiana Bell.

I. BACKGROUND AND CONTENTIONS OF THE PARTIES

2. In the *KLF* complaint, KLF alleged that Indiana Bell assessed its Centrex service customers a "PBX-trunk-equivalency charge" for interstate access instead of applying the SLC and such billing was in violation of its interstate access service tariff, Indiana Bell Tariff F.C.C. No. 34, Section 69.202(b) of the Commission's Rules, 47 C.F.R. § 69.202(b), and the Commission's *Access Charge Decisions*.[5] KLF also alleged that Indiana Bell's books of account did not properly reflect the entire interstate SLC as interstate revenue or show the corresponding credit in its intrastate revenue accounts. Finally, KLF argued that the bills of Indiana Bell's customers were misleading because they combined the interstate SLC and intrastate credit to reflect a single net charge.

3. In response to the complaint, Indiana Bell claimed it had not acted contrary to its own tariff, or a Commission order or rule. Indiana Bell maintained that it had obtained approval from the Indiana Public Service Commission (Indiana PSC) to apply the credit as proposed and that its books of account accurately reflected this pricing method. Finally, Indiana Bell argued that there was no public interest reason to unbundle its customers' bills to list the interstate SLC and intrastate credits separately.

4. The Bureau denied the complaint. In so doing, the Bureau stated that Indiana Bell "correctly recorded the entire interstate end-user access charge [subscriber line charge] as interstate revenue on the company's books. An offset credit was then recorded in its intrastate revenue account. . . ." *Order*, para. 7. The Bureau then determined that Indiana Bell had not priced intrastate Centrex services inconsistently with the *Access Charge Decisions*. *Id.* Finally, the Bureau held it would serve no useful public purpose to order Indiana Bell to restructure its bills to separately identify the SLC and the intrastate credit. *Id.* at para. 9.

5. In its petition, KLF raises the same arguments it raised before. In addition, it claims that new evidence developed in the course of an ongoing Centrex rate proceeding before the Indiana PSC[6] supports its claim for reversal. KLF maintains that the evidence shows that Indiana Bell has not reduced its intrastate Centrex rates to offset the federal SLC, but rather it has developed a "convoluted" accounting system designed to assess Centrex customers only a portion of the federal SLC and then burden intrastate ratepayers with making up the shortfall.[7]

6. In its opposition to the petition, Indiana Bell maintains that KLF does not raise any significant new evidence to warrant reversing the Bureau's Order. Indiana Bell claims it is collecting and properly accounting for the appropriate amount of interstate SLC. It believes that KLF's complaint is with the intrastate credit which is offered pursuant to Indiana Bell's state tariff. If KLF objects to this provision, Indiana Bell argues, KLF should pursue the matter with the Indiana PSC.

7. The remaining issue before us in the *NATA* complaint is essentially the same as that raised in the *KLF* case. The *NATA* complaint was filed against eleven Bell Operating Companies (BOCs), including Indiana Bell, alleging that the BOCs were unlawfully pricing Centrex services in violation of Sections 201, 202(a), and 203 of the Communications Act, 47 U.S.C. §§ 201, 202(a), and 203, as well as the Commission's policies set forth in the *Second Computer Inquiry*[8] and *Access Charge Decisions*. As to the *Access Charge Decisions*, NATA, like KLF, objected to state tariffs which permitted intrastate credits for Centrex customers, which it characterized as the practice of reducing federal SLCs for such customers. The Commission dismissed NATA's complaint against the BOCs on the basis that "NATA has failed to convince us that we should assert jurisdiction over intrastate Centrex rates in this case." *NATA* at para. 32. As to the SLC issue, the Commission determined that NATA failed to show that the BOCs, except Indiana Bell, are providing unlawful rebates of interstate charges. *NATA* at para. 26. The

Commission dismissed the complaint against Indiana Bell except for the SLC issue, which it deferred until the *KLF* case was resolved since the facts therein had a bearing on the decision with respect to Indiana Bell. *Id.* at 14 n.26.

II. DISCUSSION

8. We have reviewed the record in this case and the Bureau's Order and are unpersuaded that the Bureau's Order should be reversed. Accordingly, we will deny KLF's petition and dismiss NATA's complaint.

9. KLF's petition for reconsideration essentially reiterates the arguments it presented before and which we found to be unsubstantiated. Nor do the documents submitted by KLF contain information that convinces us to overturn the Bureau's Order. We have established in both cases that Indiana Bell is collecting and booking the appropriate amount of interstate SLC. Having established this point, the remaining matter in controversy is the intrastate credit which Indiana Bell applies before billing its Centrex customers. The credit is applied pursuant to Indiana Bell's intrastate tariff. Section 2(b) of the Act, 47 U.S.C. § 152(b), reserves questions of intrastate ratemaking to the states. The Commission has already found that "[i]t is within a state commission's authority to regulate rates for intrastate Centrex service. Unless a state's actions were found to substantially affect the conduct and development of interstate communications, this Commission is without jurisdiction to interfere." *NATA* at para. 20 (citation and footnotes omitted). If either KLF or NATA objects to a provision of Indiana Bell's intrastate tariff, it should seek redress in the appropriate state forum.

10. Finally, KLF offers no new arguments in support of its contention that Indiana Bell should "unbundle" its bills to itemize the charges for interstate and intrastate charges and we affirm the Bureau's decision in this regard.

11. Accordingly, IT IS ORDERED that the complaint filed by North American Telecommunications Association against Indiana Bell Telephone Company, File No. E-85-26, IS DISMISSED.

12. IT IS FURTHER ORDERED that the Petition for Reconsideration filed by KLF Electronics, Inc., File No. E-84-30, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

FOOTNOTES

[1] KLF Electronics, Inc. v. Indiana Bell Telephone Co., Mimeo No. 5837 (released July 19, 1985) (*KLF*). Also before the Bureau is an opposition to the petition filed on August 30, 1985 by Indiana Bell. Petitioners filed a reply on September 11, 1985. The petition has been referred to the Commission pursuant to Section 1.106(a)(1) of the Rules.

[2] NATA v. Mountain States Telephone and Telegraph Company, *et al.*, FCC 86-304 (released Aug. 1, 1986), *appeal filed*, No. 86-1464 (D.C. Cir. Aug. 20, 1986) (*NATA*).

[3] Centrex is a switching service that telephone exchange carriers offer. Centrex service performs some of the functions performed in a PBX, and therefore telephone exchange carriers offering Centrex compete with companies like KLF, that provide PBX switches. Because Centrex switches are located at the local exchange carriers' switching offices, rather than at customers' premises, a separate access line is required from the central office to each customer station, *i.e.*, to each telephone handset to switch calls within the customer's premises. With a PBX, on the other hand, switching takes place at the customer's premises, and relatively fewer access connections can handle traffic from a larger number of stations.

[4] Under a trunk-equivalency pricing scheme, a Centrex subscriber effectively pays the same SLC as a PBX user. For example, if two access trunks were required to handle traffic from ten stations linked to a PBX and the tariffed SLC rate is $6 per access line, the customer would incur an aggregate monthly charge of $12 (2 x $6) for interstate end-user access. If the same customer were to use Centrex instead of CPE switching, ten local loops would be required to provide access for all ten stations; hence the customer would incur a total monthly charge of $60 at the per-line SLC rate. If a "PBX-trunk-equivalent" charge were assessed instead of the per-line SLC, the customers theoretically would pay only $12 per month.

[5] MTS and WATS Market Structure, Third Report and Order, CC Docket No. 78-72, Phase I, 93 FCC 2d 241 (1983) ("Access Charge Order"), *recon.*, 97 FCC 2d 682 (1983) ("Reconsideration Order"), 97 FCC 2d 682 (1983) (First Reconsideration order), *further recon.*, 97 FCC 2d 834 (1984) ("Second Reconsideration order"), *aff'd in part, remanded in part sub nom.* National Ass'n of Regulatory Utility Comm'rs v. FCC, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985), *further recon.*, 50 Fed. Reg. 43708 (Oct. 29, 1985) (Third Reconsideration Order), collectively referred to as *Access Charge Decisions*.

[6] Petition of Indiana Bell Telephone Co., Inc. for Authority to Make Adjustments to its Existing Centrex Exchange and Network Services Rates, for Approval of New Schedules, Rates, and Rules and Regulations Therefor, Cause 37558 (commenced Aug. 1, 1984). The material submitted by KLF consists of various motions and excerpts from testimony submitted in conjunction with the case.

[7] KLF also relies on the Commission's decisions in Idaho Public Utilities Commission, FCC 85-270 (released May 17, 1985), and Iowa Telephone Association's Petition for Declaratory Ruling, FCC 85-228 (released May 17, 1985), and Iowa Telephone Association's Petition for Declaratory Ruling, FCC 85-228 (released May 7, 1985). In those cases, the Commission found it unlawful for a state commission to require certain telephone companies to file tariffs eliminating interstate SLC for customers who placed no interstate calls. Here, Indiana Bell is charging interstate SLC regardless of whether customers place any interstate calls. Thus, the cases are inapposite.

[8] Amendment of Section 64.702 of the Commission's Rules and Regulations, 77 FCC 2d 384 (1980) (Final Decision), *recon.*, 84 FCC 2d 50 (1980) (Reconsideration), *further recon.*, 88 FCC 2d 512 (1981) (Further Recon sideration), *aff'd sub nom.* Computer & Communications Industry Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983), *aff'd* second further reconsideration, FCC 84-190 (released May 4, 1984 (Second Computer Inquiry). The Second Computer Inquiry was applied to the divested BOCs in slightly modified form in Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Equipment by the Bell Operating Companies, CC Docket No. 83-115, 95 FCC 2d 1117 (1984), *aff'd sub nom.* Illinois Bell Telephone Co. v. FCC, 740 F.2d 465 (7th Cir.), *aff'd* on reconsideration, 49 Fed. Reg. 26056 (June 26, 1984), *aff'd sub nom.* North American Telecommunications Ass'n v. FCC, 772 F.2d 1282 (7th Cir. 1985).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 86-423

Petition for Modification of Section 68.318(b) of the Commission's Rules	RM-5363

NOTICE OF PROPOSED RULE MAKING

Adopted October 23, 1986; Released: November 7, 1986

By the Commission:

1. Before the Commission is a petition for rulemaking, RM-5363, filed by several Bell Operating Companies (BOCs) requesting that the Commission initiate a rulemaking proceeding proposing to amend Section 68.318(b) of the rules, 47 C.F.R. § 68.318(b), to eliminate the requirement that local exchange carriers provide DC power for certain customer premises equipment functions used in conjunction with 1.544 Mbps digital services.[1] Comments have been filed by the NYNEX Telephone Companies (NYNEX), Verilink Corporation (Verilink), GTE Corporation (GTE), Independent Data Communications Manufacturers Association, Inc. (IDCMA), American Telephone and Telegraph Company (AT&T), and Continental Telecom, Inc. (Continental). For the reasons stated below, we grant the petition and issue this notice of proposed rulemaking.

Background

2. Part 68 of the Commission's rules, 47 C.F.R. Part 68, provides the technical and procedural standards under which direct electrical connection of customer-provided telephone equipment, systems and protective apparatus may be made to the nationwide telephone network. Compliance with those standards assures equipment manufacturers and consumers that their equipment is connectable to the network, and assures telephone companies that such connection will not cause harm to the network. In *Amendment of Part 68 of the Commission's Rules Concerning Connection of Equipment, Systems and Protective Apparatus to the Telephone Network (Second Report and Order)*, CC Docket 81-216, 49 Fed. Reg. 48,714 (December 14, 1984), *reconsideration* , 50 Fed. Reg. 48,203 (November 22, 1985), the Commission amended Part 68 to create standards for registration and customer provision and interconnection of network channel terminating equipment (NCTE) used in conjunction with subrate and 1.544 Mbps digital transmission services.[2] Section 68.318(b) (1) adopted at that time requires that NCTE contain identifiable circuitry that assures a continuity of output signal. Under that section it is required that the NCTE assure either (1) that the output signal meet a specified minimum pulse density (12.5%), which normally would be accomplished by insertion of additional pulses when pulse density falls too low, or (2) transmit of one of three specified keep alive signals when pulse density falls too low. Section 68.318(b) provides that the power to operate pulse density and keep alive circuitry "shall come from the line." The purpose of these line-powered pulse density and keep alive functions is to prevent oscillation of regenerators in the carrier's transmission facilities which can occur in the absence of a signal or a signal of sufficient pulse density.[3] Such oscillation can cause interference to adjacent channels of communications and was identified as a sufficient potential network harm to warrant adoption of Section 68.318(b). *Second Report and Order*, para. 17-18.

Contentions

3. The BOCs state that early versions of repeaters used with 1.544 Mbps transmission services were subject to self-oscillation in the absence of input signals. Since 1972, however, the BOCs have employed line repeaters using integrated components which are essentially immune from oscillation caused by an absence of signal, they state. The BOCs contend that older style repeaters are no longer being installed and do not generally exist in the local loop plant. Any remaining problems of oscillation have been avoided, they say, by other means such as carrier-provided keep alive signals. The immunity from harm of contemporary facilities has been demonstrated, argue the BOCs, by the fact that under the rules adopted for interconnection of NCTE customers can disconnect NCTE without prior consent of the telephone carrier. This disconnection, they say, has taken place without network harm. Accordingly, the BOCs urge, there is no reason for the current rule requiring carriers to provide line power to operate pulse density and keep alive functions. Similarly, they conclude, there is no reason to retain the requirement under Section 68.318(b) that NCTE contain keep alive capability as a condition of Part 68 registration.

4. The BOCs further point out that the existing requirements are compatible only with metallic transmission media, *ie.*, fiber optical cable cannot deliver electric current. Therefore, they argue, the present requirements discourage the use of fiber optics. They state that local exchange carriers (LECs) are using fiber optic transmission media to provide 1.544 Mbps service but that this has resulted in the necessity for two interfaces for this service – one where metallic circuits are employed and another where fiber optics are used.[4] They claim that the absence of a single interface creates customer inconvenience, inhibits network inprovements, and may interfere with the achievement of Integrated Services Digital Networks (ISDN) and comparably efficient interconnection. Industry groups meeting under the auspices of the Exchange Carriers Standards Association (ECSA) are working on achieving a single interface that will accommodate both technologies and have reached a tentative agreement on such an interface description, the BOCs state. However, they contend that it is necessary for the standard to reflect either a "wet", *i.e.*, powered, or "dry", *i.e.*, unpowered, interface. The general consensus reached is for a dry interface, they state, but that this will necessitate amendment of Section 68.318(b).

5. The BOCs also contend that the existing Section 68.318(b) creates a potential electrical hazard. They state that carrier line powering arrangements are designed to accommodate the length of the line and can be as high as 260 volts dc and is almost always 130 volts dc or more. This voltage level at the customer interface can pose a considerable risk to untrained customers, state the BOCs, and that policies permitting customer provision of net-

work access wiring will increase that exposure. *See e.g., Detariffing the Installation and Maintenance of Inside Wiring*, CC Docket 79-105, FCC 86-63, released February 24, 1986; *Amendment of Part 68* , 97 FCC 2d 527 (1984). Based on these considerations, the BOCs propose revision of Section 68.318(b) to eliminate any requirement that carriers provide line power on 1.544 Mbps service. (No other service would be affected by this proposal.) It is additionally proposed that keep alive capability be eliminated as a condition of NCTE registration. However, the BOCs would retain the requirement that NCTE contain a pulse density maintenance capability.

6. Commenters generally support the BOC petition. GTE states that it supports the petition because it reflects the consensus achieved at the ECSA T-1 subcommittee meeting in Juanuary, 1986. It recommends, however, that a reasonable transition period should be provided – eighteen months – to allow manufacturers to change their equipment to accommodate the new interface. GTE also urges that carriers not be foreclosed from providing a sealing current.[5] Continental emphasizes that there is a developing consensus among industry groups to adopt a dry interface under Section 68.318(b) because fiber optics will be the major transmission medium for ISDN. IDCMA states that it supports the principle of an unpowered interface, but that it cannot offer its unqualified support at this time because of uncertainties as to the means by which the BOCs intend to implement their proposal. Achievement of an unpowered interface can be accomplished consistent with Commission policy permitting direct connection of customer premises equipment, states IDCMA, but it would also be possible to implement such an interface by including on the network side of the interface functions which the Commission has determined to be CPE.[6] It further points out that the BOC proposal does not explain the effect of the proposed rule on CPE designed in accordance with the existing rule.

7. For its part, AT&T endorses the objective of a uniform customer-carrier interface for 1.544 Mbps, and it would not object to such an unpowered interface. However, it believes that the keep alive function should be continued as a requirement of NCTE registration under Part 68.[7] It claims that local carriers and AT&T rely on keep alive signals to monitor circuit status and to activate trouble alarms. AT&T also urges that a three year transition period be allowed for manufacturers to continue to market terminal equipment meeting the existing rule. AT&T urges that the Commission clarify that permitting a dry interface would not obviate the carriers' obligation to provide sealing current and that it would only apply to 1.544 Mbps service. It proposes rule amendments that would permit an unpowered interface. require the customer to provide power for keep alive, and require the customer to notify the telephone companies when power for keep alive and minimum pulse density functions is removed, or when the NCTE is disconnected.

8. Verilink opposes the BOCs' proposal to eliminate the requirement that dc power be provided by the carriers on metallic lines used for 1.544 MBps service and that NCTE contain keep alive functions as a condition of registration. Verilink states that NCTE performs a number of functions such as signal regeneration, loop-back, and keep alive signals which must be provided in order to avoid disruption to adjacent transmission lines and services. The use of line power to operate these functions ensures that they will be available even if the customer experiences an ac power failure. Verilink contends that line power also has the function of providing a sealing current and should therefore be retained as a requirement for 1.544 Mbps service under Part 68. Verilink further contends that even if petitioners were to eliminate from their networks all repeaters capable of oscillation, other carriers not joining in the petition have not or will not do so in the near future, and their transmission systems will remain vulnerable to insufficient pulse density in signals originating in petitioners' networks. Thus, Verilink concludes, line power must continue to be provided by petitioners in order to power vital pulse density and keep alive functions. Verilink points out that AT&T's PUB 62411, Accunet T1.5 Service Description and Interface Specifications (1985), continues to require that critical functions performed by NCTE receive power at all times, even in the event of power failure. PUB 62411, § 4.4.1. This technical reference also states that "AT&T will remove the circuit from operation to ensure that harm does not occur on the network." *Id* . § 5.4.1. Verilink is also unpersuaded by contentions by carriers that keep alive signals can be provided by carriers within the network. It states that this could only be useful if the NCTE contains a loopback state, but that the Part 68 rules for NCTE adopted by the Commission do not require any loopback capability. Petitioners also exaggerate the amount of industry support for the proposal, states Verilink, in that the T1C1.2 Digital Interface Working Group has not reached a consensus or formally adopted any position. Finally, Verilink questions the electrical hazard associated with T1 circuits in that installation of complex or system wiring must be performed or supervised by trained personnel. See 47 C.F.R. § 68.215. Verilink states, however, that it would not object to a clarification of Section 68.318(b) that optical fiber circuits be exempt from line power requirements, but, line power should still be provided on metallic circuits, it maintains.

Discussion

9. The line power requirement for 1.544 Mbps service under Section 68.318(b) would not appear to serve the purpose for which it was designed as repeaters using integrated circuits immune to oscillation are now employed extensively in the network. The carriers' contention that line powered keep alive and pulse density requirements are not necessary to assure adequate protection are entitled to significant weight. While Verilink contends that line powering of such functions is essential for network protection, these contentions are unsupported and do not warrant denial of the petition for rulemaking. Accordingly, we will propose at this time elimination of the requirement in Section 68.318(b) that carriers provide line power to operate NCTE functions for 1.544 Mbps digital service.

10. Similarly, insofar as line repeaters may essentially be immune from oscillation there would appear to be no reason to require that NCTE contain keep alive capability. Therefore, we are also proposing at this time elimination of the keep alive requirement of Section 68.318(b). It may also be unnecessary to retain minimum pulse density capability as a condition of NCTE registration. The BOCs, while alleging generally that minimum pulse density will protect against network harms other than oscillation of line repeaters, have failed to identify what harms they seek to prevent. Moreover, they have also indicated that minimum pulse density is more closely related to network performance rather than harm to the network.

Petition, p. 4. The Commission has previously indicated that network compatibilty or performance standards are not normally adequate to justify Part 68 equipment registration standards, and should be addressed by industry groups rather than government regulations. *Cf . Interconnection Order,* 94 F.C.C.2d 5 (1983). Accordingly, we are additionally proposing elimination of the present minimum pulse density requirement. Parties should substantiate in technical detail requests that these regulatory requirements be retained. Comments from ECSA and other industry groups would be especially useful.

11. Several parties have raised the issue of the effect of the elimination of line power on the operation of installed NCTE. However, it is unclear from the existing comments the extent to which elimination of the present requirement would make obsolete currently connected or inventoried NCTE. The present rule contemplates that line power will be provided for keep alive and pulse density functions. There is no requirement that other functions performed by NCTE be line powered. However, some registered NCTE may in fact use line power for other functions than keep alive or pulse density maintenance. In addition, insofar as carriers or other parties are able to justify retention of keep alive and/or minimum pulse density capabilties in NCTE as a condition of registration, appropriate transition periods, or delays in elimination of the line power requirement, may be appropriate to permit customers and manufacturers to provide alternative power sources for these functions. Commenting parties should explain to what extent NCTE may presently be using line power for functions other than keep alive and pulse density maintenance. Comments should additionally explain to what extent NCTE already has the capability or option of using premises power, and to the extent that it does not, what retrofitting or additional equipment would be necessary to use premises power, and the costs and time necessary to provide such retrofitting. This information will enable the Commission to fashion an appropriate transition period for elimination of line power on 1.544 Mbps service if necessary. Carriers and other parties are additionally requested to relate any proposed transition period to the Commission's purposes under Part 68, *e.g.* Section 68.110(b), 47 C.F.R. § 68.110(b)[8]

12. The carriers have contended that the present requirement for line power inhibits improvements in the network, and may prevent achievement of ISDN and comparably efficient interconnection. The Commission believes that these factors may be relevant in its final determination on whether to retain or eliminate any present requirement under Section 68.318(b). The Commission requests that comments explore these issues.

Ex Parte Presentations

13. For purposes of this non-restricted informal rulemaking proceeding, members of the public are advised that *ex parte* contacts are permitted from the time of issuance of a notice of proposed rulemaking until the time a draft order proposing a substantive disposition of such proceeding is placed on the Commission's Sunshine Agenda. In general, an *ex parte* presentation is any written or oral communication (other than formal written comments/pleadings and oral arguments) between a person outside the Commission and a Commissioner or a decision-making member of the Comission's staff which addresses the merits of the proceeding. Any person who submits a written *ex parte* presentation must serve a copy of that presentation on the Secretary for inclusion in the public file. Any person who makes an oral *ex parte* presentation addressing matters not fully covered in any written comments peviously filed in the proceeding must prepare a written summary of that presentation which must be served on the Secretary for inclusion in the public file, with a copy to the Commission official(s) receiving the presentation. Each *ex parte* presentation discussed above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. *See generally,* Section 1.1231 of the Commission's rules, 47 C.F.R. § 1.1231. In reaching its decision , the Commission may take into consideration information and ideas not contained in the comments, provided that such information or a writing indicating the nature and source of such information is placed in the public file, and provided that the fact of the Commission's reliance on such information is noted in the Report and Order.

Regulatory Flexibility Act Initial Analysis

14. *Reason for Action.* The Commission is initiating this rulemaking in order to determine whether Section 68.318(b) of the rules should be eliminated.

15. *Objectives.* The objective of this notice of proposed rulemaking is initiate a rulemaking and seek comment on the Commission's proposal to eliminate the requirements of Section 68.318(b) of the rules.

16. *Legal Basis.* The Communications Act of 1934, as amended, 47 U.S.C. §§ 151 *et seq.*

17. *Description, potential impact and number of small entities affected.* The Commission's proposal to eliminate the requirements of Section 68.318(b) will primarily affect telephone carriers and terminal equipment manufacturers. Under the Commission's proposal telephone carriers would not be obligated to provide line power on 1.544 Mbps service, and terminal equipment manufacturers would not be required to provide in network channel terminating eequipment keep alive or minimum pulse density capability as a condition of Part 68 registration.

18. *Recording, recordkeeping and other compliance requirements*: None.

19. *Federal rules which overlap, duplicate or conflict with the Commission's proposal:* None.

20. *Any significant alternatives minimizing impact on small entities and consistent with stated objective:* None.

21. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4, 201-205, 215, 220, 313, 309(e)-(h) and 412 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154, 201-205, 215, 218, 220, 313, 309(e)-(h), and 412, and 5 U.S.C. § 553, That NOTICE IS GIVEN of proposed rule changes to Part 68, 47 C.F.R. Part 68, as discussed above.

22. Interested parties may file comments on or before December 22, 1986, and reply comments on or before January 6, 1987.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

FOOTNOTES

[1] The BOCs filing are the Bell Telephone Company of Pennsylvania, the Chesapeake and Potomac Telephone Company, the Diamond State Telephone Company, Illinois Bell Telephone Company, Indiana Bell Telephone Company, Michigan Bell Telephone Company, Nevada Bell, New Jersey Bell Telephone Company, the Ohio Bell Telephone Company, Pacific Bell, South Central Bell Telephone Company, Southern Bell Telephone and Telegraph Company, Southwestern Bell Telephone Company, and Wisconsin Bell, Inc.

[2] Subrate digital services are those operating at speeds less than 1.544 Mbps. These are 2.4 kbps, 4.8 kbps, 9.6 kbps, and 56 kbps services.

[3] Generally, the term regenerator refers to a device that samples an incoming data stream and transmits a reconstructed data stream. The term repeater, on the other hand, may refer to a device that performs signal detection and amplification functions on an analog signal or to a device that serves as a regenerator. We use the terms regenerator and repeater interchangeably.

[4] The BOCs have not explained how the present requirement for line power is met where fiber optics are employed.

[5] A continuous electrical current on a metallic circuit retards corrosion. This is referred to as a sealing current.

[6] While it did not specify which functions it was concerned about, presumably IDCMA refers to signal regneration, keep alive, pulse density and loopback testing. *See* Interconnection Order, 94 F.C.C.2d 5 (1983).

[7] AT&T contends that it is not necessary for the Commission to require that NCTE contain back-up power, *e.g.* batteries, for the keep alive functions.

[8] Section 68.110(b) provides: *Changes in telephone company facilities, equipment, operations or procedures.* The telephone company may make changes in its communications facilities, equipment, operations or procedures, where such action is reasonably required in the operation of its business and is not inconsistent with the rules and regulations of this Part. If such changes can be reasonably expected to render any customers terminal equipment incompatible with telephone company communications facilities, or require modification or alteration of such terminal equipment, or otherwise materially affects its use or performance, the customer shall be given adequate notice in writing, to allow the customer an opportunity to maintain uninterrupted service.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

NATIONAL PAGE, INC. File No. 24309-CD-ML-01-83

For revocation of the station license
for Station KPE498 in the Public Land
Mobile Radio Service at Greenville,
Pickens, and Spartanburg, S.C.

and

NATIONAL PAGE, INC. File No. 22383-CD-AL-1-86

(Assignor)

COMMUNICATIONS PROPERTIES
ASSOCIATES

(Assignee)

For consent to the assignment of the
station licenses for Station KPE498,
Station KNKC438, and Station KNKC657,
at various locations in South Carolina

ORDER ON REVIEW

Adopted: October 23, 1986 Released: November 7, 1986

By the Commission:

1. Presently before us is an application for review filed by Morris Communications, Inc. ("Morris") of the Common Carrier Bureau's *Memorandum Opinion and Order*, Mimeo No. 941, released November 21, 1984, denying Morris' petition for an order to show cause why National's license for Station KPE498 should not be revoked. In addition, Morris has filed a petition to deny National's application to assign Stations KPE498, KNKC438 and KNKC657 to Communications Properties Associates on the grounds that its application for review against Station KPE498 is pending. National has filed responsive pleadings and has responded to a Mobile Services Division information request. We have reviewed the arguments presented by Morris,[1] including its comments on National's response to the information request, and we find that the action of the Common Carrier Bureau was consistent with Commission policy.[2]

2. Accordingly, IT IS ORDERED that the Application for Review filed by Morris IS DENIED.

3. IT IS FURTHER ORDERED that Morris' Petition to Deny the assignment application of National and Communications Properties Associates IS DENIED.

4. IT IS FURTHER ORDERED that the application for assignment filed by National Page and Communications Properties Associates, File No. 22383-CD-AL-1-86, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

FOOTNOTES

[1] Morris filed two supplemental petitions to deny against Communications Properties Associates on grounds unrelated to the issues herein. Morris showed that Communications Properties Associates has advertised in the yellow pages as a licensee before its instant assignment application was granted. On its face, this appears to be a violation of our rules. However, it is not a violation which warrants denial of the application. Accordingly, we will grant the application and direct the Common Carrier Bureau to consider the arguments raised by Morris in a later order.

[2] National proved through extensive documentation that its Station KPE498 was timely constructed, that it was diligent in pursuing both the construction of its station as authorized and the resolution of equipment problems, and that National was capable of providing one-way and manual two-way service on its system as of the day it applied for its covering license. Morris has presented insufficient information to make a *prima facie* case of wrongdoing by National. As the Bureau indicated in its *Memorandum Opinion and Order*, National should have been forthcoming with the information that its automatic two-way service was not available at the time of its request due to equipment supply problems; nevertheless, we find that National has not made a material misrepresentation or nondisclosure warranting a revocation hearing.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Petition of

TELOCATOR NETWORK OF AMERICA

For Issuance of Tax Certificates
for Exchanges of Non-Wireline
Cellular Partnership Interests in
Cellular Radio Service Markets
31-90

ORDER ON RECONSIDERATION

Adopted: October 23, 1986; Released: November 7, 1986

By the Commission: Commissioner Dennis not participating.

1. On October 17, 1985, Harry J. Pappas d/b/a California Portaphone (Portaphone) filed a Petition for Reconsideration of the Commission's Memorandum Opinion and Order granting the petition in the captioned matter.[1] Telocator Network of America (Telocator) filed an Opposition to Petition for Reconsideration, as did MCI Airsignal, Inc. and MCI Cellular Telephone Company, who filed jointly (MCI). Portaphone filed a reply.

BACKGROUND

2. On May 24, 1985, Telocator requested that the Commission issue tax certificates under Section 1071(a)[2] of the Internal Revenue Code to make non-wireline applicants who had reached settlements for cellular radio service markets 31-90 eligible for non-recognition tax treatment of the sales, exchanges, and/or consolidations of partnership interests that they had transacted. In its petition, Portaphone initially alleges that the Commission failed to give any public notice of Telocator's request. Portaphone asserts that even if the notice requirements of the Administrative Procedure Act (APA) do not apply here, this omission before the announcement of a new policy of broad applicability renders the Commission's decision legally questionable; therefore, the order should be set aside and public comment received. Second, Portaphone argues that the Commission's decision to issue tax certificates is contrary to the plain language of Section 1071(a), since the affected transactions do not relate to the ownership or control of "radio broadcast stations." Portaphone further submits that the issuance of the tax certificates was not necessary as an incentive to encourage the voluntary trading of partnership interests here, since most of the consolidation of ownership interests in markets 31-90 occurred well before Telocator filed its petition and the Commission released its decision. Portaphone asserts that selection of one applicant by lottery would have been a better way for achieving the Commission's policy of expediting cellular service and that the Commission's encouragement of settlements was counterproductive in leading to inefficient, non-competitive ownership structures, with the result that there was no overriding public interest that justified the issue of the certificates.

3. Telocator and MCI respond that Portaphone has not demonstrated pursuant to Section 1.106(b) of the rules that it had standing to file the petition. Telocator asserts that Portaphone identified itself only as a cellular applicant in the Fresno market[3] and failed to state how it would be adversely affected by the issuance of tax certificates. Telocator further asserts that the public notice requirements of Section 309(b) of the Communications Act and Section 553(b) of the APA do not apply to petitions for special relief, such as tax certificate requests, and that Portaphone provides no support for its assertion that the Commission usually solicits public comment on such petitions. Telocator also disputes Portaphone's characterization of the Commission's new policy as having broad applicability since the grant of the petition was limited to the non-wireline applicants in markets 31-90, and emphasizes that the trading of partnership interests was directly compelled by the Commission's new cellular policies promoting settlements. Telocator charges that Portaphone overlooks the Commission's need to resolve the regulatory inequity between the wireline and non-wireline applicants created by the elimination of non-recognition tax treatment in Section 1031 of the Internal Revenue Code for which the wireline applicants had qualified.[4] Telocator also asserts that Portaphone's contention that the tax certificates are not necessary incorrectly focuses on the certificates rather than the underlying sales or exchanges, which are the criteria of Section 1071 (a)(i).[5] Lastly, Telocator argues that Portaphone's comparison of the Commission's policy of encouraging settlements with the alleged simpler and less expensive alternative of lottery is not relevant to the request for tax certificates. MCI also contends that Portaphone's position is repetitive of its challenge to the Commission's cellular licensing process[6] and constitutes an improper collateral attack on the policies behind it.

4. Portaphone replies that it is a party in interest because (1) it is an applicant in the Fresno market and (2) an award of tax certificates for the trading of partnership interests in that market could undermine its appeal.[7] Portaphone also argues that the Commission policy of encouraging full market settlements does not amount to "new" or "changed" policy as required by Section 1071(a).[8]

Discussion

5. We find that Portaphone has no standing to file its petition for reconsideration. Portaphone has an application interest only in the Fresno market. However, it did not elect to enter any settlement agreements. Therefore, as a non-participant in the settlement process, Portaphone has not demonstrated any economic interest in whether or not the tax certificates should be issued. Moreover, it has not provided support for the allegation that the issuance of tax certificates would have an adverse effect on its appeal.[9] Thus, Portaphone has failed to demonstrate any distinct and palpable injury traceable to our decision to issue the tax certificates. *See e.g., Allen v. Wright,* 104 S.Ct. 3315, 3325 (1984); *O'Shea v. Littleton,* 414 U.S. 488, 494 (1974). While in the past, we have on occasion conferred standing before this agency where it might not otherwise exist under Article III,[10] in this instance petitioner's alleged harm is so patently tenuous that exercise of such discretion is clearly unwarranted. Accordingly, we find that Portaphone is without standing to seek review.

6. In any event, we have reviewed the pleadings, and we find that to the extent any new arguments, including those referencing the statutory language, are raised, they fail to demonstrate errors or omissions so material as to change our conclusions. *See Employment Practices of Stations - Charlotte, N.C. Market,* 77 F.C.C. 2d 1 (1980); *WEOK Broadcasting,* 4 Rad. Reg. 2d (P & F) 503 (1965). In addition, as for its contentions concerning the need for public notice and comment,[11] Portaphone has not cited any statute or rule requiring a notice and comment proceeding. A request for a tax certificate is not an application for a construction permit or station license subject to the notice provisions of Section 309 (b) of the Communications Act. Further, an agency is free to promulgate new policies either through a rulemaking or in an adjudicatory proceeding. *See S.E.C. v. Chenery Corp.,* 332 U.S. 19, 20 (1947); *Chisholm v. FCC,* 538 F.2d 349 (1976), cert. denied, 429 U.S. 890 (1976). The APA notice and comment procedures set forth in Section 553 are not applicable to adjudicatory proceedings or required prior to issuance of interpretive rulings. See 5 U.S.C. Section 553. Moreover, the procedures followed were consistent with our longstanding practice in issuing tax certificates.[12]

Conclusion

7. Accordingly, IT IS ORDERED that the Petition for Reconsideration filed October 17, 1985, by Harry J. Pappas d/b/a California Portaphone IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

FOOTNOTES

[1] *Petition of Telocator Network of America,* 58 Rad. Reg. 2d (P & F) 1443 (1985) (*Tax Certificates).*

[2] 26 U.S.C. Section 1071(a). This section authorizes the Commission to issue tax certificates in connection with the sale or exchange of property.

[3] Portaphone is one of the original seventeen applicants for the Fresno non-wireline cellular license. The other sixteen applicants merged to form the Fresno Cellular Telephone Company (FCTC). Portaphone declined to participate in this merger; consequently, a lottery was held to select the winning applicant. FCTC was selected and Portaphone ranked seventeenth out of seventeen entries. Following the award by the Common Carrier Bureau of a construction permit to FCTC, Portaphone filed an application for review that the Commission denied. *Fresno Cellular Telephone Company,* FCC 85-550, Mimeo 36222, released October 17, 1985. Portaphone sought judicial review of this determination before the U.S. Court of Appeals, D.C. Circuit where it is pending. *Harry J. Pappas d/b/a California Portaphone v. FCC,* No. 85-1700 (D.C. Cir., filed October 28, 1985).

[4] 26 U.S.C. Section 1031. The wireline applicants had completed the trading of their cellular partnership interests in these markets prior to July 18, 1984, the date Congress amended Section 1031 to make these exchanges taxable. *See Tax Certificates, supra,* at n. 21.

[5] 26 U.S.C. Section 1071 (a) (i) states: "the sale or exchange is necessary or appropriate to effectuate a change in policy of, or the adoption of new policy by, the Commission . . . "

[6] Portaphone has elsewhere sought judicial review of the Commission's Cellular Lottery Rulemaking, 98 FCC 2d 175 (1984), *reconsideration,* 58 Rad. Reg. 2d (P & F) 677 (1985). *See Harry J. Pappas d/b/a California Portaphone v. FCC,* No. 85-1346 (D.C. Cir., filed June 10, 1985), consolidated with *Wireless Telephone Company* of New Mexico v. FCC and United States of America, No. 84-1201 (D.C. Cir., filed May 24, 1984).

[7] See, note 3, supra.

[8] See, note 5, supra.

[9] See, note 3, supra.

[10] U.S. Const. art. III, Section 2, cl. 1.

[11] Contrary to Portaphone's assertion, our decision was not broadly applicable, but rather was limited in scope not only to then on-wireline cellular applicants in markets 31-90 but to those whose transactions satisfied specific conditions. See Tax Certificates, supra, at paras. 21,22.

[12] Most of the requests for tax certificates from FCC licensees in the various communications services under our jurisdiction merely involve the application of our previously established tax certificate policies. These requests are generally granted by letter. In other instances where we have concluded that some change in the tax certificate policy is required, our determination has been either released as a public notice, see e.g., Tax Certificates, 19 Rad. Reg. 2d (P&F) 1831 (1970);Issuance of Tax Certificates, 59 FCC 2d 91 (1976); Policy Statement on Issuance of Tax Certificates, 92 FCC 2d 170(1982); or included as part of an order addressing our response to related issues that compels the change. See Multiple Ownership Rules, 28 FCC 2d 662, at 671, n. 6 (1971).

Before the
Federal Communications Commission
Washington, D.C. 20554

In Re Applications of

PETROLEUM COMMUNICATIONS, INC. — File No. 30003-CL-P-84

and

GULF CELLULAR ASSOCIATES[1] — File No. 30001-CL-P-84

For New Domestic Cellular Radio Telecommunications Service Systems In the Gulf of Mexico

ORDER ON RECONSIDERATION
(Proceeding Terminated)

Adopted: October 23, 1986; Released: November 7, 1986

By the Commission:

1. The following pleadings are before the Commission for resolution: a) Two petitions for reconsideration of portions of the Common Carrier Bureau's August 14, 1985 *Memorandum Opinion and Order,* Mimeo No. 6337 ("August Order") by Petroleum Communications, Inc., (Petro Com) and by Gulf Cellular Associates (Gulf Cellular); and each party filed an opposition to the other's petition; b) comments by several intervenors to which responsive pleadings were filed; c) Gulf Cellular's Motion For an Order to Show Cause Why the Application of Petroleum Communications, Inc. Should Not Be Designated for Hearing, and responsive pleadings filed thereto; d) Petro Com's and Gulf Cellular's supplemental information filed in response to conditions placed upon their construction permits in the August Order; e) Petro Com's Motion to Lift Stay, to which Gulf Cellular filed an opposition; f) Petro Com's response to the Bureau's request for further information concerning new issues raised by Gulf Cellular, as well as its Motion to Strike a portion of Gulf Cellular's opposition, to which responsive pleadings were filed.

2. A brief review of the background of this proceeding is helpful to the issues raised. In 1983, the Commission ruled on an application for developmental authority to provide cellular service to the Gulf of Mexico filed by Petro Com. *Petroleum Communications, Inc.,* 54 Rad. Reg. 2d (P&F) 1020 (hereinafter " *Petroleum").* We denied the request for developmental authority, and announced that we would accept applications for commercial cellular systems in the Gulf of Mexico. Among the issues we considered was the question of interference with land-based systems. We noted that "there is a significant possibility of interference to land-based cellular systems in SMSAs within 75 miles of Petro Com's proposed sites." We decided that to avoid such interference, [a]ny offshore cellular system in the Gulf must therefore be designed to avoid significant service contour overlap with land-based systems. This may require that no transmitters are placed onshore or that only carefully placed directional antennas are used. . . . Furthermore, for proposed sites in the Gulf, we will require interference-free operation to land-based sites and coordination of proposed frequencies with operators whose base stations are within 150 miles of the offshore operator's proposed coverage area. *Petroleum,* para. 20. Another issue we addressed concerned the timing of Petro Com's application. Parties argued that because the Gulf of Mexico is not an SMSA area, applications to provide cellular service there should not be accepted until the filing date for other non-SMSA areas. We found that this issue was moot because "any incidental service provided by Petro Com in either the top-90 SMSAs or in smaller markets is secondary to service offered by land-based systems. . . any offshore applications that may be filed are not mutually exclusive with applications for areas onshore." *Petroleum,* paras 27-28.

3. On reconsideration,[2] we affirmed our decision to accept Petro Com's application even though it planned incursions into neighboring MSAs. We ruled that such incursions do not render an application defective, but that Petro Com would be required to reengineer its proposal if the incursions were not justified. We said that [d]ue to the unique situation presented by using cellular technology to serve the Gulf, limited incursion into adjacent systems has been authorized by our decision in Petroleum which permits land-based transmitting facilities. Land-based transmitters facilitate coverage of coastal areas, particularly in areas where the coast consists of swamps. . . . In agreeing to land-based facilities, however, we stated that Gulf operators are required to minimize interference with the land-based systems. . An ability to meet these requirements may result in removal of the Gulf operator's land-based transmitting facilities. In conformance with these requirements, we ordered Petro Com to re-engineer its proposal to employ directional antennas on land. *Petroleum Reconsideration,* note 16.

4. We accepted Petro Com's developmental application as one for commercial cellular service. In addition, three additional applications were submitted for Gulf of Mexico cellular service. One was dismissed for proposing extensive land coverage and little water area coverage. The two acceptable applications were filed by Gulf Cellular and Gulf Star. These applicants later merged, leaving two potential licensees, (Petro Com and Gulf Cellular) for the two cellular frequency blocks available in the Gulf.

5. On August 14, 1985, the Common Carrier Bureau granted the application of Petroleum Communications, Inc., for frequency block A, and the application of Gulf Cellular Associates for frequency block B. (Hereinafter the "August Order"). In its August Order, the Bureau placed a number of conditions on the applications.[3] In addition, the Bureau established for the first time a Service Area boundary for the Gulf of Mexico[4] cellular licensees. The boundary was placed at the coast line, thus excluding all inland areas from service by the Gulf of Mexico licensees. As a corollary to establishing the Gulf of Mexico Service Area, the Bureau ruled that no Gulf of Mexico cellular licensees' transmitters could be placed on land areas inside the coastline. Petro Com had proposed ten land sites (i.e., sites outside the GMSA) in the first phase of its system construction. Gulf Cellular had proposed one. The Bureau also gave an opportunity for the Gulf cellular licensees to expedite service by allowing temporary land-based transmitters for a period of six months. However, in response to Gulf Cellular's Request for Partial Stay, the Bureau stayed this provision and

condition (b) of its August Order. (*See* note 2, *supra.) Order,* Mimeo No. 7364, released Sept. 30, 1985. Petro Com's Petition

6. First, Petro Com argues that the Commission should permit its service area to include the coastal areas, which are comprised of wetlands, islands, inland waterways, harbors, and bays, as well as desolate and uninhabited land areas.[5] Furthermore, Petro Com argues that the Commission said it would afford Petro Com an opportunity to reengineer its proposal to avoid significant interference with land-based systems prior to requiring removal of land-based transmitters. Petro Com states that because the Bureau did not indicate which of its cells were objectionable, and did not offer it the opportunity to correct any problems, the Bureau has acted in an arbitrary and capricious manner. Petro Com additionally argues that its proposal does not significantly intrude into any MSAs, except Houma-Terrebonne. Petro Com adds that it has "continuously accepted the burden of coordinating with and avoiding interference to other cellular systems, and would willingly incur the cost of relieving any unpredicted interference found in actual practice. . .".

7. Petro Com argues that its potential customers will not find cellular service useful unless their service area comprises Petro Com's entire proposed area. It argues that it is fully justified in defining the appropriate, market-based GMSA for the Gulf of Mexico because there is no Metropolitan Statistical Area, and "because Petro Com was the innovator of the concept of provision of cellular service to the Gulf market. . .". It argues that the Bureau's order "would overprotect the smallest MSAs at the expense of a rational plan for prompt service to the total Gulf market."

8. Petro Com also argues that there are significant operational problems resulting from using the coast line as the GMSA boundary. It believes that users of the Petro Com system will make home subscription arrangements with a land-based system and use its system only in the roamer mode. Petro Com argues that confining its service area to water will yield a *de facto* all-roamer cellular service, and that it is not in the public interest to place its cellular service at such a level of financial risk.

Gulf Cellular's Petition

9. Gulf Cellular requests that the Commission eliminate land-based transmitters even for an interim period of six months. It argues that Petro Com has admitted that it could not ensure that it would not serve car-mounted or other land-based units from its land-based transmitters. Gulf Cellular argues that Petro Com should not be given an opportunity to use a large investment in land station construction to pressure the Commission for licensing authority beyond the six-month limit imposed in the Bureau's order. Gulf Cellular points out that Petro Com would not be financially harmed by deletion of the interim authority since it had not yet begun construction. Finally, Gulf Cellular argues that grant of interim land-based transmitters would be competitively inequitable, since Petro Com would have the advantage of receiving revenue from land-based units.

10. Second, Gulf Cellular requests that the Commission clarify the GMSA boundary. It asks that harbors and bays be included in the GMSA so that "continuous and necessary" service can be provided to vessels in transit from their ports to the open water areas. Gulf Cellular points out that the line of cases beginning with *U.S. v Louisiana,* 363 U.S. 1 (1960), (upon which the Bureau relied to establish the coastline as the service boundary), dealt with the States' rights to underwater natural resources, as against Federal rights, and was not related to radio communications licensing.

11. In its Motion for a hearing designation order, Gulf Cellular argues that Petro Com did not file an amended engineering study in response to condition (b) in the August *Order,* and also argued that Petro Com failed to disclose material information and does not meet the Commission's financial requirements.

Other Petitions

12. Comments were filed by: (a) Southwestern Bell Mobile Systems, Inc. (Southwestern), (b) Cameron Telephone Co., Columbia Cellular, Inc., Delcambre Telephone Co., Inc., and Kaplan Telephone Co., (c) Radiofone, Inc., and (d) Lafourche Telephone Company. However, their objections to land-based transmitters are moot because by this order, we deny authority to operate Gulf of Mexico transmitters on land (*See* paras. 19 - 20, *infra.)* In addition, we note that Southwestern requested clarification of the definition of the Texas coastline, specifically, whether it includes Mustang and Padre Islands. We note that under the analysis of *U.S. v. Louisiana, (The Texas Boundary Case,)* 394 U.S. 1 (1969), these islands are inside the coastline.

Supplemental Information

13. In response to the conditions placed upon their licenses by the August Order, *see* n. 2, *supra,* both Gulf licensees provided supplemental information to their applications. Petro Com provided amended financial information and 39 dBu contour maps purporting to show that its land-based transmitters would not overlap the GMSA boundary by more than a *de minimis* amount. It provided alternative GMSA boundary lines, including one meeting the definition of coastline established in *U.S. v. Louisiana, supra,* as well as one showing a GMSA including all the land areas it wishes to serve. Petro Com stated that it is unable to show water site replacements for its proposed land sites, and indicated that if its petition for reconsideration is denied, that these sites will simply be eliminated. Petro Com's proposed system would then be comprised solely of the water sites it has already proposed, and the 39 dBu contours of its revised system would be identical to 39 dBu contour maps for its proposed water locations already on record with the Commission.

14. Gulf Cellular filed a final partnership agreement among Fluor Engineers, Inc., New Vector, and Gulf Star, in satisfaction of the condition (c) listed in footnote 2, *supra.* In addition, Gulf Cellular showed that its interconnection facilities at the Pilottown (land-based) location will be transferred and the site discontinued. It also provided four sets of maps, none of which showed a GMSA defined pursuant to the August Order.

Discussion

15. There are several major questions presented to us. First is the question of where the boundary of the Gulf of Mexico licensees' service area should be placed. Second is the question of whether land transmitters should be allowed, either on an interim basis or permanently. Third is the question of Petro Com's financial showing and the

related question of whether or not transfer of control has occurred. Finally, there is a question of representations made by Petro Com concerning its proposed and authorized service areas.

Gulf of Mexico Service Area

16. We find that there is a need to define a geographic limitation for the Gulf of Mexico licensees, in order that these licensees can operate consistently within our overall national cellular licensing program. To this end, we affirm the Common Carrier Bureau's decision to utilize the definition of 'coastline', as well as the identification of "inland waters", as they have developed through lengthy litigation before the United States Supreme Court, pursuant to definitions in the Submerged Lands Act, 67 Stat. 29, 43 U.S.C. 1301 - 1315 (the Act), and in Article 7 of the Convention on the Territorial Sea and the Contiguous Zone [1964] 15 U.S.T. (pt. 2) 1607, T.I.A.S. No. 5639 (the Convention).[6] "Coast line" is defined by the Act as "the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters." Section 1301(c). "Inland waters" are defined by the Convention. They include bays,[7] historic inland waters,[8] and waters circumscribed by a fringe of islands within the immediate vicinity of the shoreline. Accordingly, areas included within the coastline, and therefore outside the Gulf of Mexico Service Area, are all harbors and bays along the Texas, Louisiana, Alabama, Mississippi, and Florida coasts, and the islands along the circumference of the Gulf, including the Chandeleur Islands and those surrounding the Mississippi Sound.

17. Consistent with *U.S. v. California*, 389 U.S. 155 (1967) we will adopt "the best and most workable definitions available." It matters not that the definitions were developed in order to identify underwater and other mineral rights. The important point is that a definition of the word 'coastline' is well established. Notwithstanding Gulf Cellular's argument that the "plain meaning" of the word coastline is "mainland" and that the Inland Waterways should be within Gulf of Mexico licensees' GMSA, there is neither justification nor precedent for accepting Gulf Cellular's proposal.[9] In addition, Petro Com has not convinced us that its proposed land coverage should be authorized.[10] First, persons desiring cellular service inside the coastline will receive it as the smaller MSAs and non-MSA areas are licensed. Although some coastal areas are desolate, many areas, including islands, are heavily populated and are not likely to be left unserved by the land systems. For example, in the *Miami Order* [11] we noted that the Miami-Fort Lauderdale SMSA includes the Intracoastal Waterway and the outlying Keys. We said that "a large segment of the customer population will expect and desire marine applications of cellular service." Such service is properly offered by the land system because the traffic occurs within its designated service area. Accordingly, it would not be appropriate to reassign to Gulf licensees the coastal portions of land licensees' service areas.

18. Petro Com's belief that it is entitled to define its own Gulf of Mexico Service Area for the Gulf is misguided. Water areas such as the Gulf of Mexico are neither Metropolitan Statistical Areas nor non-MSA areas. We have stated that the Gulf licensees' systems remain secondary to land systems, and that "any offshore applications that may be filed are not mutually exclusive with applications for areas onshore." *Petroleum, supra,* at 1027. Of course, both Gulf licensees may apply for any remaining MSA or non-MSA areas for which they qualify under our rules in order to expand their systems, and they may enter into regional cellular agreements with land-based cellular licensees. Accordingly, we decline to reconsider the Bureau's decision to utilize the Gulf of Mexico coastline as the boundary of the Gulf cellular licensees' GMSA.[12]

Land-based Transmitters

19. In the August Order, the Bureau indicated that contrary to our earlier conclusion in *Petroleum, supra,* land-based transmitters will unavoidably result in more than *de minimis* incursions into land areas. This is particularly true because the range of cellular transmitters over water and wetland areas is likely to be greater than predicted by the Carey method. We affirm the Bureau's finding. Although we held in *Petroleum* and in *Petroleum Reconsideration* that land based transmitters would allow for only limited incursion into land-based systems, we now have reconsidered that opinion. We find that our often-stated policy of allowing no more than a *de minimis* incursion into other systems, including non-MSA area systems, cannot be met by permitting land-based transmitters to serve the GMSA. In this case, Petro Com's Supplemental Information shows that the Carey contours of its land-based transmitters extend outside its GMSA[13] by far more than *de minimis* amounts. The largest extension into a non-MSA area which has been found to be *de minimis* to date was in the *Kansas City* [14] order. There, the Common Carrier Bureau allowed an extension of 21% of the cell area of one cell. Petro Com's cell area extensions range from 32% to 100% and cover hundreds of square miles. There can be no question that such extensions are greater than *de minimis* .

20. It is clear that in order to remain consistent with our existing regulations and policy concerning the protection of adjoining licensees' service areas, all Gulf licensees' transmitters must be offshore. To this end, we have decided to reverse that portion of the Bureau's order which permitted the Gulf licensees to use land-based transmitters for six months.[15] There is no guarantee that Petro Com would find replacement sites within the six-month interim period. If none were found, those parts of Petro Com's service area covered only by land transmitters would have to go dark. This is unacceptable from a public interest standpoint. Alternatively, to avoid service loss to legitimate service areas, the land transmitters would have to remain operational. This would unavoidably result in permanent, unauthorized service to land areas. Accordingly, Gulf of Mexico licensees are subject to the *de minimis* extension limitation of Section 22.903 of the Commission's Rules, as calculated pursuant to Section 22.903(c).[16]

Supplemental Information In Response to Conditions

21. Petro Com's amended financial qualifications were filed in response to condition (d) of the August Order (*see* n. 2, *supra* .) The Bureau placed the condition on Petro Com because it required further information concerning a letter which was filed by Petro Com on March 14, 1985, notifying the Commission of the sale of 49 percent of the voting shares of the company to Pacific Telecom, Inc. (PTI). J. Arthur Petranek retained 51% of the voting shares of Petro Com. The March 6, 1985

agreement among PTI, Petro Com, and Petranek indicated that PTI "wishes to invest in the mobile telecommunications business and to acquire an equity interest" in Petro Com. The agreement provides that PTI would purchase 49% of Petro Com's voting stock for $80,000 in cash, and that Petro Com would preserve PTI's 49% share of Petro Com without further consideration. In addition, the agreement said that "the shares of [Petro Com] to be purchased by PTI . . . will, when issued, be fully paid and non-assessable . . .".

22. In view of the unusual nature of this agreement, and because the purchase price was erased in the document when it was first provided to the Commission, the Bureau conditioned the grant of Petro Com's application on the provision of another bank letter acknowledging PTI's participation, and on the provision of all agreements between PTI on the one hand and Petro Com and/or Petranek on the other. Petro Com's supplemental information provided four loan agreements. The first agreement was dated March 11, 1984, one year before the stock sale agreement between PTI and Petranek. The parties to the agreement were PTI and Petro Com. They agreed that PTI would lend Petro Com $70,000, to be paid at the rate of $10,000 a month, "in order to pay its reasonable expenses associated with processing its application to the FCC." Petro Com's Supplemental Information Exhibit F1, para. 1. In addition, paragraph 3 of the agreement states that as further consideration, Petro Com agrees to "make a private offering of its securities . . . and PTI shall have the right of first refusal to purchase such securities . . .".

23. The remaining three agreements are amendments to the original agreement. Each one raises the loan amount, and the final agreement establishes a maximum of $110,000. Nothing else in the original loan agreement is changed.

24. Finally, Petro Com supplies a new bank letter from the Allied Bank of Texas. It states that the bank "is willing to lend [Petro Com] up to $12,000,000 for your proposed cellular radio communications system. . . . We understand that Pacific Telecom is now a 49% shareholder in Petro Com." The amount and conditions of the loan are the same as in the original bank letter. Petro Com's estimate of the amount needed to construct its system as proposed (including the disallowed land sites) is $8,294,800. (Petro Com application, Exhibit 9.4). In addition, Petro Com has an agreement with Rotan Mosele, Inc., an investment banking firm, to assist in raising $15 to $18 million through placement of securities. The type of securities is not mentioned. (Petro Com application, Exhibit 9.0.1).

25. Petro Com's showing is challenged by Gulf Cellular, which charges that Petro Com's relationship with Pacific Telecom, Inc., (PTI) raises questions of *de facto* and *de jure* transfer of control and real party in interest. In addition, Gulf Cellular charges that Petro Com has violated the FCC's disclosure rules by failing to provide the terms of the 1984 loan agreement with PTI within thirty days of ratification. Finally, it states that Petro Com's bank letter is insufficent. We reject Gulf Cellular's arguments.

26. With regard to Gulf Cellular's concern that Petro Com has transferred control of its license to PTI, we find that this has not occurred. Section 22.39(a)(1) of the Commission's Rules, 47 Title C.F.R., states that transfer of control will always be considered to have occurred if there has been a "change from less that 50% ownership to 50% or more ownership;" in addition, Section 22.39(a)(2) states that "in other situations a controlling interest shall be determined on a case-by-case basis considering the distribution of ownership, and the relationships of the owners, including family relationships." The first situation has not occurred here because there has been a sale of only 49% of the outstanding stock of Petro Com. Furthermore, the 1984 loan agreement provision which gives PTI an option to buy Petro Com's securities six months after grant does not amount to a transfer of control. *Turner Broadcasting System, Inc.*, 101 F.C.C.2d 843, 849 (1985) ("As a general matter, an option to buy shares does not enter into transfer-of-control determinations until the option is exercised.")[17] Speculation regarding a future occurrence is not a ground for designating an application for hearing. Finally, Gulf Cellular's argument that a secret agreement must exist because Petro Com has sold 49% of its stock in exchange for legal expenses is likewise speculative and not supported.

27. Transfer of control under Section 22.39(a)(2) requires a review of the particular circumstances of the case. In *News International , Inc.*, 97 F.C.C.2d 349, 355-356 (1984), in which we analysed the question of changing control, we stated that "influence and control are not the same. The influence must be to the degree that a minority shareholder is able to 'determine' the licensee's policies and operations, or 'dominate' corporate affairs." Under the particular facts of this case, we find that a transfer of control has not occurred. First, there is no agreement indicating that PTI has a right to control Petro Com. Second, although a company with significant financial power may well be in a position to override a small company in matters of station control, that does not appear to have occurred here. The affidavit supplied by Mr. Petranek regarding plans underway for station construction (*see* para. 33, *infra*) shows that Mr. Petranek is actively in control of arranging station construction, marketing, and developing his Gulf cellular service. In addition, the letter of financial commitment from Allied Bank of Texas (Allied) was written at the behest of Mr. Petranek. Since Mr. Petranek, who retains his position as sole officer and director of Petro Com, also retains control of day-to-day business and is responsible for having acquired the lending agreement from Allied, we find that there has not been a transfer of control.

28. Neither will we accept Gulf Cellular's argument that Petro Com violated former rule Section 22.917(e)(1)[18] and Section 1.65 of the Rules because it did not report its 1984 loan agreement with PTI. The loan was, by its terms, explicitly limited to application prosecution expenses. Parties disagree on whether former Section 22.917(e)(1) required such a loan to be reported. The term "acquisition" could arguably include expenses associated with prosecuting an application. On the other hand, the rule seems to contemplate credit arrangements associated with purchase of hardware and other equipment for the station. Faced with a situation which the rule does not specifically address, but which could arguably be included within its purview, Petro Com should have informed the Commission of the loan agreement, if only out of an abundance of caution. To have done so may have obviated the need for some of the extensive pleadings in this case. Because the rule does not specifically address expenses for application prosecution, we will not find that Petro Com violated the rule. However, applicants to whom Section 917(a)(3)(iii) applies should be aware that we will interpret this rule broadly and such

loans should be reported. Finally, the more general reporting requirement, Section 1.65, is subsumed within the specific requirement addressed in this paragraph and without violation of Section 22.917(e)(1), no violation of Section 1.65 has occured.

29. We find that the documents submitted by Petro Com satisfy the condition placed upon its license by the August Order. Petro Com has made an acceptable showing of financial qualification to construct the proposed system.

30. Gulf Cellular's fulfillment of the conditions on its license is unchallenged. However, as noted earlier, Gulf Cellular did not provide a map showing the *coastline* as required by the August Order; instead, it shows the shoreline on one set of maps and the three-mile/three-league line on the other set. To avoid any further confusion regarding the limit of the Gulf of Mexico Service Area, the staff has prepared a map depicting the correct coastline limit beyond which Gulf licensees may not offer service. This map is available for examination in the station files of each applicant. Finally, Gulf Cellular submitted the final version of its settlement agreement in response to the August Order. The Motion To Lift Stay and Related Pleadings

31. Petro Com's motion to lift the stay on land-based construction is rejected, because we have granted Gulf Cellular's request for reconsideration of interim authority to construct land-based sites, *infra*. We will briefly address the motion and responsive pleadings, however, because Gulf Cellular raised new issues in its opposition. In its motion, Petro Com argues that the prohibition of inter-LATA service which applies to New Vector[19] should not limit Petro Com's service area. In addition, it states that it should be allowed to construct the entire system "for which it was initially authorized."[20]

32. In its opposition, Gulf Cellular provides photographs and hearsay affidavits arising from a boat show in which both licensees were participating, and accused Petro Com of: orally representing to potential subscribers that it will be covering land areas, presently constructing land sites in violation of the Stay Order, and completing many unapproved land sites. In a subsequent pleading, Gulf Cellular concedes that it cannot substantiate its allegations of unlawful construction. Accordingly, we reject these allegations, but we will consider the allegation regarding service area coverage.

33. In reply, Petro Com supplies an affidavit from Mr. Petranek and from a number of salespeople who had manned the boat show booth.[21] Regarding the charge of unauthorized advertising of inland service, Mr. Petranek affirms that he has personally explained the limitations on Petro Com's authorized service to his sales staff. He states that "[w]e have uniformly, and without exception, fully and correctly informed persons inquiring that, although Petro Com has requested authority to serve units in the Wetlands and on the Intracoastal Waterway, the FCC has not yet granted Petro Com's request, and that provision of service to automobiles is prohibited by the FCC." Identical affidavits have been submitted from the members of the sales staff. From photographs of Petro Com's booth at the trade show, and from Petro Com's own brochures it supplied in response to the Bureau's inquiry, it appears that Petro Com has used visual media to show that its cellular service will extend inside the coastline.

34. Both Gulf Cellular and Petro Com may legitimately represent that they intend to apply for authority to serve the Wetlands and Intracoastal Waterways at such time as the Commission accepts applications for non-MSA areas. There is, of course, no guarantee that their applications will be accepted or granted. Furthermore, until the instant order is issued, Petro Com is not misrepresenting the fact that it has requested authority to serve these areas. However, Petro Com's petition for reconsideration is now being denied. Accordingly, further representation by Petro Com that it "has applied" for authority to serve intra-coastal areas or that the FCC "has not yet granted" its request would be inaccurate. Regarding Petro Com's visual service area representations, these may have been corrected by the verbal condition to which Mr. Petranek and his sales staff have attested. Gulf Cellular has not provided first person affidavits from any individuals who were misled. Furthermore, Gulf Cellular has offered no data to support its allegation of economic harm. Accordingly, its allegations are rejected.

Ordering Clauses

35. For the foregoing reasons, IT IS ORDERED THAT: the Petition for Reconsideration filed by Gulf Cellular IS HEREBY GRANTED TO THE EXTENT INDICATED HEREIN AND IN ALL OTHER RESPECTS IT IS DENIED;

36. The Petition for Reconsideration filed by Petro Com IS HEREBY DENIED;

37. The Motion for an Order to Show Cause filed by Gulf Cellular IS HEREBY DENIED;

38. The Motion to Lift Stay filed by Petro Com IS HEREBY DENIED;

39. The Motion to Strike filed by Petro Com IS HEREBY DENIED;

40. The Supplemental Information filed by each licensee IS HEREBY ACCEPTED in fulfillment of the conditions placed upon their respective construction permits;

41. This proceeding IS HEREBY TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

FOOTNOTES

[1] Gulf Cellular Associates recently changed its name to Coastel Communications Company. Because this change occurred well after the pleadings were filed in this case, we will refer to Coastel by its original name throughout this Order.

[2] *Petroleum Communications, Inc* ., 56 Rad. Reg. 2d (P&F) 1651 (hereinafter "Petroleum Reconsideration").

[3] The Bureau imposed the following conditions in its order: a) Each applicant shall file, within 45 days, an amended service contour map, on a scale of 1:250,000, showing that its service area will not exceed the Gulf of Mexico CGSA as defined in this Order, by more than a *de minimis* amount; b) Each applicant shall file, within 45 days from the release date of this Order, its technical proposal for removing all land-based transmitter sites to areas within its CGSA. All such sites must be removed within 6 months from the date a license to cover is granted; c) Gulf Cellular shall file, within 45 days from the release date of this Order, an acceptable final Joint Venture Agreement between Gulf Cellular Associates and Gulf Star; d)

Petro Com shall file, within 45 days from the release date of this Order, an acceptable amendment to its financial and ownership qualifications as specified in this Order.

[4] The Bureau referred to the geographic boundary of the Gulf of Mexico as the "Cellular Geographic Service Area" (CGSA). We prefer to name this boundary the Gulf of Mexico Service Area (GMSA). Under our Rules, cellular licensees are responsible for determining their own CGSAs. Just as a land-based cellular licensee may not exceed its MSA boundary by more than a *de minimis* amount, the Gulf licensees may not exceed the GMSA by more than a *de minimis* amount.

[5] Petro Com exceeded the page limitation set by Section 1.106(f) of the Commission's Rules, and later filed a Request to Exceed Page Limitation. That request is hereby granted.

[6] *See U.S. v. Louisiana,* 363 U.S. 1 (1960), and the line of cases arising from it, the latest of which is *U.S. v. Louisiana, (Alabama and Mississippi Boundary Case*) 470 U.S. 93 (1985).

[7] A bay is defined as "a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast." The area of the bay must be "as large as, or larger than, that of the semicircle whose diameter is a line drawn across the mouth of that indentation." The diameter of the semicircle may not exceed 24 miles.

[8] The Convention does not specifically describe historic inland waters. The Supreme Court found that four factors contribute to determining a historic inland water: a) "the exercise of authority over the area by the claiming nation;" b)"the continuity of this exercise of authority;" c) "the acquiescence of foreign nations;" d) the vital interests of the coastal nation, including geographical configuration, economic interests, and the requirements of self-defense." *Alabama and Mississippi Boundary Case, supra,* at 101-102. The Court found here that the Mississippi Sound is an historic bay.

[9] Gulf Cellular has provided a map with a line drawn along its requested boundary. The line appears to be very similar to the definition of "shore line", which is the line of low-water mark along the mainland, 363 U.S. at 66-67, note 108, and which excludes inland waters. The "coastline" is the shoreline plus inland waters. *Id* .

[10] Petro Com's argument that a coastline GMSA boundary will place its system at great financial risk is not a reason for allowing it to serve extensive land areas. The Commission does not guarantee its licensees a viable business opportunity. Our purpose in licensing cellular applications is to provide service to the public. Furthermore, Petro Com has filed licenses to cover several base stations. It has apparently made a business decision to continue with its service notwithstanding service area restrictions.

[11] *Advanced Mobile Phone Service, Inc.* 54 Rad. Reg. 2d (P&F) 260, 271 note 35 (1983).

[12] The Gulf licensees may not advertise, offer, or provide service outside the GMSA to their customers or to roamers, nor may they inform customers or potential customers, directly or indirectly, that such service might be available.

[13] Cell site #2 is 96% outside the GMSA. (330 sq. mi.); Cell site #4 is 75% outside, (259 sq. mi.); Cell sites #6, #9, #13, and #26 lie entirely outside the GMSA, (345, 337, 325, and 133 sq. mi., respectively); Cell site #17 extends 32% outside, (105 sq. mi.); Cell site #20 extends 33% outside, (63 sq. mi.); Cell sites #23 and #25 each extend 74% outside, (144 sq. mi. for each); Cell site #24 extends 59% outside, (203 sq. mi.); and Cell site #27 extends 90% outside the GMSA (309 sq. mi.).

[14] *Advanced Mobile Phone Service* , Inc. (Kansas City Order), 54 Rad. Reg. 2d (P&F) 531 (1983).

[15] Gulf Cellular made much of the fact that Petro Com did not show a technical proposal for removing all land-based transmitter sites to areas within its GMSA and therefore, argues Gulf Cellular, Petro Com has not complied with the August Order. We find that this argument has no merit. The Bureau's Order was not intended to imply a requirement that replacement sites be found; it was intended to ensure that operating land-based transmitters would be removed by the end of the six-month interim period. In addition, the operation of condition (b) was stayed by the Bureau's *Memorandum Opinion and Order* , Mimeo No. 7364, released September 30, 1985. Thus, there is no condition which Petro Com can be accused of disregarding.

[16] Although the Carey method of computing cellular signal propagation may underestimate actual signal propagation over extensive water areas, it is the only method of propagation calculation which is readily available to the public and standardized throughout the country. Our decision to use the Carey method as the model of signal propagation in the Gulf of Mexico in no way changes Gulf licensees' responsibility to provide interference-free service areas to licensees outside the GMSA. (*See Petroleum* , *supra* , discussed in para. 2, *supra* , where we found that there is a significant probability of interference up to 75 miles from a cellular base station in the Gulf area.) Once the adjacent MSA and non-MSA licensees are operating, the Gulf licensees must modify their systems in any way necessary to avoid interfering with the land systems. As stated in earlier Petro Com orders, the Gulf licensees also have the duty to ensure frequency coordination with the land systems. However, the Gulf licensees are entitled to protection from land-based system interference within the GMSA.

[17] Although Petro Com *must* offer its securities to PTI six months after license grant, there is no indication that those securities must be in any particular form, i.e., voting stock, non-voting stock, or bonds. Accordingly, it is premature for us to find that a transfer of control was agreed to in the 1984 loan agreement. Even assuming that this requirement indicates that Petro Com has given PTI an option to buy its cellular license six months after the grant, no transfer of control to PTI has been consummated. Similarly, the Commission's rules concerning trafficking in applications will be relevant only if and when such a transfer is requested.

[18] Former Section 22.917(e) of the Rules provided that: "The following additional information shall be submitted on any form of intended credit arrangement or equity placement: (1) The details of any loan or other form of credit arrangement intended to be utilized to finance the proposed construction, acquisition, or operation of the requested facilities including such information as the identity of the creditor . . . letters of commitment, [and] terms of the transaction . . . ". Effective January 17, 1986, the requirement for additional information on credit arrangements and equity placements applies only to cellular markets 1 - 120. The new section number for this provision is Section 22.917(a)(3)(iii).

[19] New Vector, one of the partners in Gulf Cellular Associates, is precluded from providing inter-LATA communications except insofar as it may receive a waiver of the Modification of Final Judgement in *United States v. Western Electric,* 552 F. Supp. 131 (1982).

[20] Petro Com's belief that our restriction of its service area depends upon the inter-LATA service prohibition applicable to Gulf Cellular is incorrect. Our reasons for placing the GMSA at the coastline are discussed *supra.* In addition, Petro Com is mistaken in its belief that it was initially authorized for the entire system it proposed. The strict time limitations placed on

land transmitters in the August Order should make clear that Petro Com had no authority to proceed with its proposed construction schedule.

[21] This affidavit was not served on Gulf Cellular because Petro Com requests confidential treatment of the commercial information given therein. We have not relied on Mr. Petranek's account of the status and plans for Petro Com's system construction, since we have found that Gulf Cellular failed to substantiate its charges of unauthorized construction. But *seesupra*.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-425

In re Applications of

TETON BROADCASTING LIMITED PARTNERSHIP
(hereafter "Teton") File No. BPH-850712P5
Jackson, Wyoming
Req: 95.7 MHz, Channel 239C
100 kW (H&V), 322 meters

KOVA COMMUNICATIONS LIMITED PARTNERSHIP
(hereafter "KOVA") File No. BPH-850712P6
Jackson, Wyoming
Req: 95.7 MHz, Channel 239C
100 kW (H&V), 300 meters

JACKSON SKYWAVE, INC.
(hereafter "Skywave") File No. BPH-850712P8
Jackson, Wyoming
Req: 95.7 MHz, Channel 239C
100 kW (H&V), 336 meters

ECHONET CORPORATION
(hereafter "Echonet") File No. BPH-850712P9
Jackson, Wyoming
Req: 95.7 MHz, Channel 239C
100 kW (H&V), 300 meters

ARCHIE GIVENS, JR.
(hereafter "Givens") File No. BPH-850712Q4
Jackson, Wyoming
Req: 95.7 MHz, Channel 239C
100 kW (H&V), 300 meters

BEACON BROADCASTING INC.
(hereafter "Beacon") File No. BPH-850712Q2
Jackson, Wyoming (Dismissed)
Req: 95.7 MHz, Channel 239C
100 kW (H&V), 301 meters

For Construction Permit
for a New FM Station

MEMORANDUM OPINION AND ORDER

Adopted: October 24, 1986 Released: November 7, 1986

By the Commission:

1. The Commission has before it: (i) the above-captioned mutually exclusive applications for a new FM station; (ii) a request filed by David R. Nicholas and Joseph M. Russin ("Nicholas/Russin") for reconsideration of the staff's return of their application as unacceptable for filing and responsive pleadings thereto;[1] and (iii) a petition to dismiss or deny the above-captioned applications filed by Nicholas/Russin and responsive pleadings thereto.[2]

Background

2. On June 12, 1985 Nicholas/Russin tendered an application to serve Jackson, Wyoming on Channel 239C. The Nicholas/Russin application was accepted for tender on August 20, 1985, but was returned on December 19, 1985 as unacceptable for filing for failure to comply with 47 C.F.R. § 73.211(a)(2) which requires that Class C facilities specify a minimum antenna height of 300 meters (984 feet) above average terrain.[3] Six other applications for Channel 239C were listed as acceptable for filing on a public notice released December 27, 1985.

3. Nicholas/Russin filed a request for reconsideration of the dismissal of its application (" *Request* ") and a petition to dismiss or deny ("*Petition*") the six accepted applications, On January 21 and 27, 1986, respectively. In the former, Nicholas/Russin requests reinstatement of its application, and either grant of a waiver of 47 C.F.R. § 73.211(a)(2) or, in the alternative, specification of a site availability issue in the hearing designation order. In the latter, Nicholas/Russin alleges that neither the five applicants proposing antenna towers on the Snow King East Electronic Site in Bridger-Teton National Forest nor KOVA, who proposes to locate near Spring Gulch Road 1.9 miles north of Jackson, has reasonable assurance of the availability of their sites.[4] Accordingly, Nicholas/ Russin requests that all six applications be dismissed or denied.

4. In its tendered application, Nicholas/Russin's only statement concerning its proposed 105 meter antenna height was the following: "Due to the extreme terrain surrounding the community of Jackson, the proposed height above average terrain is less than minimum for Class C facilities." Nicholas/Russin claims in its request for reconsideration, however, that its tendered proposal "obviously sought that compliance with the minimum antenna height requirement be excused by appropriate waiver of the rules." *Request*, at 3. Nicholas/Russin further alleges that it had initially sought to build a tower satisfying the Commission's height requirement but had thereafter ascertained that "such a proposal would not be received favorably by local authorities." *Id.* at 2. The authorities in question are stated to be the U.S. Forest Service's administrator of the Snow King East Electronic Site, and the Teton County Board of County Commissioners.

5. Nicholas/Russin argues in its objection that "there exists merely a *possibility* that the (Snow King East) site may ultimately be available for the applicants' use," a status insufficient to constitute reasonable assurance of site availability. *Petition* at 4 (emphasis in original) citing *William F. Wallace and Anne K. Wallace*, 49 FCC 2d 1424 (Rev. Bd. 1974). Since the five applicants proposing to locate on Snow King East were apparently aware of this admonition, Nicholas/Russin requests that these applications be dismissed for improperly certifying that there is reasonable assurance of antenna site availability. Finally, Nicholas/Russin claims that the Review Board's decision in *Alden Communications Corp.*, 102 FCC 2d 518 (Rev. Bd. 1985), *recon. denied* 103 FCC 2d 1 (1986) ("*Alden Communications*") is directly controlling in this matter.

6. Similarly, Nicholas/Russin alleges that the proposal by KOVA to locate near Spring Gulch Road has been rejected once by the Teton County Commissioners, a

decision unlikely to be reversed given the unchanged membership of that board. In support, Nicholas/Russin provides an affidavit from the Chairman of the Board of County Commissioners for Teton County, Wyoming which asserts that the proposed construction of an FM broadcast tower at the Spring Gulch Road site is unacceptable. *Petition* at 19.

Discussion: Nicholas/Russin's" Waiver" Request

7. In the *Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19936 (1985) ("*Report and Order*"), the Commission adopted new "hard look" procedures for the processing of FM applications and set forth specific criteria relevant to a determination that an application is sufficient for tender. Once "an application [is] found to be sufficient for tender [it] will be studied to determine its acceptability for filing, that is, to determine whether it is *in compliance with applicable Commision rules*." *Id.* at 19946 (emphasis added). The *Report and Order* made no substantive change in existing policy governing acceptability of applications as defined in 47 C.F.R. § 73.3566(a) and the Commission's *Public Notice* concerning patently defective AM and FM construction permit applications, 49 Fed. Reg. 47331 (1984), *recon. denied* 57 RR 2d 1603 (1985).[5] § 73.3566(a) states, in pertinent part, that applications "patently not in accordance with the FCC rules, regulations or other requirements, *unless accompanied by an appropriate request for waiver, will not be accepted for filing*." (emphasis added). Requests for waiver, the rule continues, "shall show the nature of the waiver or exception desired and shall set forth the reasons in support thereof."

8. The statement contained in Nicholas/Russin's application clearly fails to cite either the rule or the policy violated. Neither does it provide any detail as to the reason for non-compliance, public interest factors in support of a waiver, or reference to precedent that favors such a waiver. Although the applicant claims in its reconsideration request that the statement contained in its application "obviously sought that compliance with the minimum antenna height requirment be excused by appropriate waiver of the rules," Nicholas/Russin's statement fails to "plead with particularity" the facts and circumstances warranting waiver of the rules. *WAIT Radio v. FCC*, 418 F. 2d 1153, 1157 (D.C. Cir. 1969). Despite Nicholas/ Russin's acknowledged contacts with Forest Service staff in late spring of 1985, it offers no evidence why it did not utilize this information in a perfecting amendment containing a waiver request filed during either the 30-day "window" filing period (June 13-July 12, 1985) or the subsequent amendment period (August 20-September 19, 1985) provided after notice of acceptance for tender pursuant to the revised processing procedures adopted in the *Report and Order*, 50 Fed. Reg. 19936. To allow such perfecting amendments, however, after the above-noted periods have lapsed would undermine the streamlined, efficient processing procedures adopted in the *Report and Order* to expedite the authorization of new or expanded FM service to the public. *See Donovan Burke*, FCC 86-180 (released April 18, 1986).

Discussion: Site Availability

9. Applicants are required, pursuant to paragraph 22 and Appendix B of the *Report and Order*, "to show some reasonable assurance that the site for each proposed transmitting antenna is available." 50 Fed. Reg. at 19939. Commission requirements, the *Report and Order* emphasizes, "will be satisfied when an applicant has contacted the property owner or owner's agent and has obtained reasonable assurance in good faith that the proposed site will be available for the intended purpose." *Id.* The applicants proposing sites on Snow King East executed their certifications based on contacts with either Alan Silker or David Ballard of the U.S. Forest Service. Nicholas/Russin does not challenge that such contacts were made, but instead it argues that the representations made by the U.S. Forest Service do not constitute anything more than a mere possibility that the Snow King East site will be available for location of a tower at the heights necessary to satisfy Commission requirements. In his letter to principal Dave Nicholas in June 1985, Supervisory Forestor John Combs stated that "it is possible that we would issue a permit for [the Snow King East] site" subject to "a number of management restrictions for the site" and to review by all existing permittees of the Snow King East site. *Petition* at 16. In his affidavit executed January 24, 1986, Mr. Combs notes that the Snow King East site is "potentially available, assuming that there are no resource or current user conflicts." *Petition* at 15. In the statement provided by Mr. Silker as part of Teton Broadcasting's opposition, Mr. Combs' statement is clarified to mean that "the site would be potentially available provided there were no *unresolvable* resource or user conflicts." *Opposition* at Attachment B (emphasis in original). Nicholas/Russin has offered no evidence that such conflicts would exist or that any eventual newcomer to the Snow King East site would be unable to comply with the Commission's long-standing policy that newcomers to a common site are responsible for taking the necessary steps to eliminate objectionable interference to existing facilities. *Midnight Sun Broadcasting Company*, 3 RR 1751 (1947); *B & W Truck Service*, 15 FCC 2d 769 (1968). 10. When an applicant claims to have reasonable assurance that its site will be available, a site availability issue will not be specified unless a reasonable showing is made which demonstrates that the applicant will not be able to obtain approval of its plans from the local authorities. *See, e.g., El Camino Broadcasting Corp. et. al.*, 12 FCC 2d 329, 330 (Rev. Bd. 1968). The situation regarding prospective use of Snow King East contrasts sharply with *Alden Communications*, a television proceeding in which the State of Arizona gave *no* assurances of any type as to the availability of the proposed site and the applicant failed to file an application in a timely fashion with the appropriate authorities for use of the requested site. The record in this proceeding indicates that the prospective Snow King East users had reached a negotiated understanding with the U.S. Forest Service as to the availability of the site, contingent upon set restrictions and procedures. *Cf. Alden Communications*, 102 FCC 2d at 521. Accordingly, Nicholas/Russin has failed to raise a substantial and material question regarding the availability of the Snow King East site to an eventual permittee in the instant proceeding.

11. Nicholas/Russin's petition also argues that KOVA's application should be dismissed because KOVA did not have reasonable assurance of site availability. In support of this claim, Nicholas/Russin has provided an affidavit from the Chairman of the Board of County Commissioners for Teton County, Leslie Petersen, which states that in August 1985, the Board had occasion to consider KOVA's proposal and determined that it would not be acceptable. Ms. Petersen's affidavit also states that she does not believe the Board's position on this matter has

changed since the Commissioners currently serving on the Teton County Board are the same Commissioners who participated in the earlier determination. In opposition, KOVA asserts that the Board's determination was rendered after KOVA's FM application was filed with the Commission and that KOVA was never notified that such a determination had been made. Moreover, KOVA asserts that at the time its application was filed, it had reasonable assurance from the Spring Gulch Road site owner that this site would be available and had no reason to believe that its proposal could not otherwise be effected. Under these circumstances, we believe that KOVA properly certified in its application that it had reasonable assurance of site availability. However, Nicholas/Russin has provided sufficient evidence to demonstrate that the County will not provide the necessary approval for KOVA to construct at its proposed site. Accordingly, a site availability issue will be specified against KOVA.

Analysis of the Mutually Exclusive Applications

12. By letter of March 13, 1986, Beacon requested dismissal of its application. The request, which is voluntary and in accord with our requirements governing such matters, will be granted, and Beacon's application will be dismissed.

13. Since the proposals of Teton, Skywave, Echonet and Givens may have a significant environmental impact as defined by 47 C.F.R. § 1.1307, they are required to submit the environmental impact information described in 47 C.F.R. § 1.1311.[6] Accordingly, each will be required to file within 30 days of the release of this Order an environmental assessment with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980).

14. An engineering study of the Echonet and Givens applications reveals that their respective contour maps (Exhibits VB-4A and VB-4B) do not reflect the directional field intensity pattern displayed in Exhibits VB-2A.[7] The contours presented assume a constant omnidirectional power of 100 kilowatts, which is contrary to the directionality of the proposed antennas and therefore not in accordance with the methodology prescribed for such contour exhibits in 47 C.F.R. § 73.313(c). Further, the answers to Section V-B, Item 5 of FCC Form 301 indicate beam tilt. This is contrary to the vertical plane patterns displayed in Exhibits VB-2B, which shows no beam tilt. Finally, Exhibit VB-2A shows only one unspecified field intensity pattern. Both horizontal and vertical field intensity directional patterns should be displayed as functions of the azimuth. Accordingly, Echonet and Givens shall submit amendments concerning the above-noted discrepancies in their directional antenna patterns with the presiding Administrative Law Judge within 30 days of the release of this Order.

15. The applicants listed below have petitioned for leave to amend their applications after the last dates for filing amendments as of right. These amendments report significant changes in information previously furnished the Commission and, pursuant to 47 C.F.R. § 1.65, they are accepted for filing. However, the applicants may not improve their comparative position after the time for amendments as of right has passed. Therefore any comparative advantage resulting from these amendments will be disallowed.

APPLICANTS	DATE AMENDMENT(S) FILED
Teton	February 6 and 20, 1986
KOVA	March 3, 1986
Skywave	December 18, 1985, January 15 and February 10, 1986
Echonet	September 12, 1985 and February 3, 1986
Givens	October 15, 1985 and February 7, 1986

16. Data submitted by the applicants indicates that there would be a significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

17. Since no determination has been received from the Federal Aviation Administration as to whether the antennas proposed by Skywave, KOVA, Echonet and Givens constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

18. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

19. Accordingly, IT IS ORDERED, That, pursuant to 47 U.S.C. § 309(e), the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. If a final environmental impact statement is issued with respect to Teton, Skywave, Echonet or Givens which concludes that the proposed facilities are likely to have an adverse effect on the quality of the environment, to determine:

(a) whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319; and

(b) whether, in light of the evidence adduced pursuant to (a) above, the applicant is qualified to construct and operate as proposed.

2. To determine whether KOVA Communications has reasonable assurance of the availability of its proposed transmitter site;

3. To determine whether there is a reasonable possibility that the tower heights and locations proposed by Skywave, KOVA, Echonet and Givens would constitute a hazard to air navigation.

4. To determine which of the proposals would, on a comparative basis, best serve the public interest.

5. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

20. IT IS FURTHER ORDERED, That the request for reconsideration filed by Nicholas/Russin IS DENIED,[8] and the petition to dismiss or deny filed by Nicholas/Russin IS GRANTED to the extent indicated in paragraph 11 and DENIED in all other respects.

21. IT IS FURTHER ORDERED, That, pursuant to the applicant's request, the application of Beacon Broadcasting, Inc. IS DISMISSED.

22. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Teton, Skywave, Echonet and Givens shall submit the environmental assessment required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge, with a copy to the Chief, Audio Services Division.

23. IT IS FURTHER ORDERED, That Echonet and Givens shall amend their applications to correct discrepancies concerning their proposed antenna patterns, as specified in paragraph 14 above, with the presiding Administrative Law Judge within 30 days of the release of this Order.

24. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Teton, KOVA, Skywave, Echonet and Givens ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

25. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

26. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919·M St., N.W., Washington, D.C. 20554.

27. IT IS FURTHER ORDERED, That, to avail themselves of the oppportunity to be heard, the applicants and any party respondent herein shall, pursuant to 47 C.F.R. § 1.221(c), in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

28. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to 47 U.S.C. § 311(a)(2) and 47 C.F.R. § 73.3594, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by § 73.3594(g).

FEDERAL COMMUNICATIONS COMMISSION

William Tricarico
Secretary

FOOTNOTES

[1] Nicholas/Russin's request for reconsideration by the Mass Media Bureau has been referred by the staff to the Commission, pursuant to 47 C.F.R. § 1.106(a)(1).

[2] In response to the Nicholas/Russin request for reconsideration, oppositions were filed February 5, 1986 by KOVA and Skywave. Nicholas/Russin replied to these oppositions on February 18, 1986. In response to Nicholas/Russin's petition to dismiss or deny, oppositions were filed February 25, 1986 by KOVA, Skywave and Givens. Nicholas/Russin filed its reply to these oppositions on March 7, 1986.

[3] An application filed by Ken Braddick (File No. ARN-850712P7) also was returned on December 19, 1985 as unacceptable for filing for failure to correctly list the predicted distances to the 1 mV/m and 3.16 mV/m contours.

[4] The Snow King site is presently utilized by broadcast licensee KMTN (FM), Jackson, Wyoming. The KMTN tower is located approximately 500 feet from the proposed sites of Givens, Teton, Echonet and Skywave.

[5] Although Nicholas/Russin does not specifically make such an allegation, many similarly situated applicants (i.e. those whose applications have been returned as unacceptable for filing who are now seeking staff reconsideration of that action) argue that the commission failed to sufficiently explain its acceptability criteria in the *Report and Order*. Given that no substantive changes were made in the acceptability criteria for FM applications, it was not necessary to rearticulate those criteria in the *Report and Order*.

[6] The respective proposals indicate operation could cause exposure of workers or general public to levels of radio frequency radiation in excess of the "Radio Frequency Protection Guides" recommended in "American National Standard Safety Levels with Respect to Human Exposure to Radio Frequency Electromagnetic Fields" issued by the American National Standards Institute.

[7] The engineering portion of the respective applications are virtually identical as to the exhibits provided.

[8] In order to better utilize the Bureau's limited processing staff resources, we hereby approve staff consideration and disposition of tenderability and acceptability matters in the context of the relevant hearing designation order rather than in a separate action document. See 47 C.F.R. § 1.106(a)(1).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CERTIFICATION BY THE LOUISIANA PUBLIC SERVICE COMMISSION CONCERNING REGULATION OF CABLE TELEVISION POLE ATTACHMENTS

File No. ENF-85-47

MEMORANDUM OPINION AND ORDER

Adopted October 24, 1986 ; Released November 7, 1986

By the Chief, Common Carrier Bureau:

1. On April 28, 1986, BellSouth Corporation ("BellSouth"), on behalf of its operating company, South Central Bell Telephone Company, petitioned for further reconsideration of the Bureau's order which held that the Louisiana Public Service Commission ("Louisiana PSC") does not regulate pole attachments within the meaning of 47 U.S.C. § 224(c). *Certification by the Louisiana Public Service Commission Concerning Regulation of Cable Television Pole Attachments*, Mimeo No. 3427 (released Mar. 27, 1986) ("*Order*"). Oppositions to BellSouth's petition were filed by the Louisiana Cable Television Association ("LCTA") and Group W Cable, Inc.

2. Our *Order* was predicated on a Louisiana Court of Appeal decision which held that the Louisiana PSC lacked jurisdiction to regulate pole attachment matters.[1] BellSouth alleges, *inter alia*, that under Louisiana law the Court of Appeal's judgment does not become final and definitive until an application for a writ of certiorari to the Louisiana Supreme Court is denied. This issue is now moot because the appellate court's decision was recently reversed by the Louisiana Supreme Court, which concluded that the Louisiana PSC properly asserted jurisdiction over cable television pole attachments. *Louisiana Cablevision, et al. v. Louisiana Public Service Commission*, No. 86-C-0375, slip op. at 10 (La. Sept. 8, 1986).

3. Although the Louisiana PSC's jurisdiction to regulate pole attachment matters is no longer at issue, we will consider the argument raised but not reached in the earlier proceeding that the Louisiana PSC has not made effective rules and regulations implementing its regulatory authority over pole attachments in conformity with 47 U.S.C. § 224(c). The Bureau has already considered and rejected a similar attack on the adequacy of a state's regulatory scheme for pole attachment matters. *Certification by Maryland Public Service Commission Concerning Regulation of Cable Television Pole Attachments*, Mimeo No. 3621 (released Apr. 8, 1986). In both that decision and the R eport and Ord er in MM Docket No. 84-1296, 50 Fed. Reg. 18637 (1985), the Commission made clear that it would not prejudge a state's regulatory scheme for pole attachments once the state has filed a certification that it regulates rates, terms, and conditions of pole attachments pursuant to 47 U.S.C. § 224(c) and 47 C.F.R. § 1.1414. It will not look behind a certification unless it has evidence that a party is unable to file a complaint with the state Commission or the state Commission has failed to act on a complaint within the prescribed period.

4. The Louisiana PSC certification meets the formal requirements of Section 224(c). None of the parties opposing the Louisiana certification alleges that anyone attempted to file a complaint with the Louisiana PSC and was unable to do so due to a lack of appropriate procedures. Nor is there any evidence of a complaint which has been pending in Louisiana longer than the 180-day period the statute allows. We conclude that LCTA, the petitioner in the original proceeding, has failed to demonstrate that it exhausted its remedies at the state level before seeking relief in this forum. Therefore, we will accept the Louisiana PSC's March 13, 1985, certification and will add Louisiana to the list of states which have certified that they regulate pole attachments. Thus, the relief sought by BellSouth in the instant petition will be granted.

5. Accordingly, IT IS ORDERED, pursuant to 47 C.F.R. § 0.291, that the petition for further reconsideration filed by BellSouth Corporation on behalf of South Central Bell Telephone Company IS GRANTED.

6. IT IS FURTHER ORDERED, that the Ord er in the above-captioned proceeding, Mimeo No. 3427 (released Mar. 27, 1986), IS VACATED.

FEDERAL COMMUNICATIONS COMMISSION

Albert Halprin
Chief, Common Carrier Bureau

FOOTNOTES

[1] *Louisiana Cablevision v.* Louisiana Public Service Comm'n., No.CA-84-1114, slip op. at 8-9 (La. Ct. App., 1st Cir., Dec. 26, 1985).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

BELLSOUTH CORPORATION AAD 6-1547

Request for Increase in
Capitalization Level for
Cellular Radio Services

MEMORANDUM OPINION AND ORDER

Adopted: October 30, 1986; Released: November 7, 1986

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. BellSouth Corporation (BellSouth) has filed a request for approval, on an interim basis, of additional capitalization of $85 million for cellular radio activities pending Commission action on a final capitalization plan to be filed by December 15, 1986. BellSouth states that capitalization beyond that presently authorized is required in connection with its proposed acquisition of certain stock interests in non-wireline cellular radio companies.[1] For the reasons set forth below, we grant BellSouth's request.

II. BACKGROUND

2. Section 22.901 of the Commission's rules sets forth conditions under which certain telephone companies may offer cellular radio service. One such condition is that the service be provided only through a separate entity. Section 22.901(d)(3) provides that the subject carriers: Must obtain Commission approval as to the manner in which the separate corporation is to be capitalized, prior to obtaining and transferring any assets, and must obtain Commission approval of any modification to a Commission- approved capitalization plan.

3. In the *NewVector Interim Capitalization Order*,[2] we discussed the background of Section 22.901(d)(3) and the manner in which it has been applied since the divestiture of American Telephone and Telegraph Co. We noted that the Commission's concern with capitalization of the cellular radio operations of the Bell Operating Companies (BOCs) has been different from that pertaining to capitalization of the *Computer II* companies pursuant to Section 64.702(d)(4) of the rules. We also noted that the BOCs' parent companies were, at divestiture, effectively authorized $142 million in cellular capitalization, and that requests for an increase in this level will be treated as petitions for modification of the original capitalization plan. *NewVector Interim Capitalization Order*, *supra*, at paras. 2-4. *See* also Capitalization Plan of Pacific Telesis for COMET, Inc., Mimeo No. 2845 (released February 27, 1986), *application for review pending*.

III. DISCUSSION

4. The factors which BellSouth cites in support of its request for an interim increase in its capitalization level are similar to those which led us to approve an interim increase in the cellular capitalization authority of NewVector. BellSouth has taken advantage of opportunities to expand its cellular radio operations to such an extent that the capitalization limit which it inherited at the AT&T divestiture may not be adequate for its post-divestiture operations. It must file a plan for permanent capitalization of its cellular radio operations, and we will then have full opportunity to determine whether that capitalization level poses significant danger to its regulated telephone operations.[3] In the interim, we see no public interest considerations which warrant denial of the request. As BellSouth notes, a grant of the interim request would raise its capitalization for cellular radio operations to only two percent of BellSouth's shareholder equity and to less than one percent of its assets, as of September 30, 1986.

IV. ORDERING CLAUSES

5. Accordingly, IT IS ORDERED, that pursuant to Sections 4(i) and 4(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154 (i) and (j), BellSouth's request for an interim capitalization level of its cellular radio operations of $227 million IS GRANTED.

6. IT IS FURTHER ORDERED, that this *Memorandum Opinion and Order* IS EFFECTIVE UPON ADOPTION.

FEDERAL COMMUNICATIONS COMMISSION

Albert Halprin
Chief, Common Carrier Bureau

FOOTNOTES

[1] BellSouth does not concede that Commission approval of capitalization for these stock purchases is required. However, it has filed the request to avoid controversy on this issue.

[2] NewVector Communications, Inc., Request for Interim Increase in Capitalization Level, AAD 6-1453, Mimeo No. 4909 (released June 2, 1986) (*NewVector Interim* Capitalization Order).

[3] We will place BellSouth's permanent plan on Public Notice and request comments thereon.

Before the
Federal Communications Commission
Washington, D.C. 20554

Application for review of action taken under delegated authority which denied a request by Custard, Inc. that a competitor's public coast station license be revoked. PR-4116-S

MEMORANDUM OPINION AND ORDER

Adopted: October 21, 1986 ; Released: November 7, 1986

By the Commission:

1. The Commission has before it an application for review filed August 8, 1985, by Custard, Inc. (Custard). Custard requests review of the Private Radio Bureau's Chief, Compliance Branch, Special Services Division (staff) denial on November 7, 1985 of Custard's "Request for Order to Show Cause Why Station License Should Not Be Revoked." Custard requested that the staff begin license revocation proceedings against Public Coast Station WHF-988, which is licensed to Recreational Marine, Inc. (Recreational Marine). Recreational Marine is owned by J. Steve Brodie (Brodie).

2. There has been a long-running dispute between Custard and Brodie. They own competing Public Coast Stations[1] in the Dallas, Texas area. This proceeding stems from Custard's application for assignment of Public Coast Station KFN-244. In response to this application, Brodie filed a number of complaints against Custard alleging among other things that Custard was operating his station on an unauthorized frequency and was illegally operating his ship radio station on land. Custard in turn alleged that Brodie violated Section 705 of the Communications Act[2] by intercepting Custard's communications and divulging them to the Commission. Custard's application for assignment of Station KFN-244 was ultimately granted on August 9, 1985.

3. Although Custard's application was granted, he requested that the staff initiate a revocation proceeding against Brodie's public coast station license because of Brodie's alleged violation of Section 705. In denying Custard's request for a revocation proceeding, the staff stated in its letter of November 7, 1985:

> You also state that the license should be revoked because Brodie's "outrageous attempt to complain to United States Government about perceived violations of law or agency rules." When, as here, an investigation determines that there is insufficient evidence to act on a complaint, this does not imply that the complaint was unwarranted or that any adverse consequences should flow from having made the complaint.

In his application for review Custard now maintains that the staff erred in finding that Brodie's complaint did not violate Section 705 and in not initiating a license revocation proceeding against Brodie for his putative violations of Section 705.

4. The relief Custard seeks is in the nature of *mandamus* in that he asks the Commission to order the staff to initiate a revocation proceeding. But Custard has no legitimate grievance. Custard's application (against which the complaints were lodged) was ultimately granted. More importantly, there is no indication in the record that in receiving the transmissions and complaining to the Commission Brodie was acting in bad faith. Brodie's complaints were received by the staff and forwarded to Custard for comment and reply. Custard is now merely seeking punitive action against a competitor who complained to the Commission about the manner in which Custard operated his public coast station. In light of the foregoing, even assuming *arguendo* that Brodie technically violated Section 705, the sanction sought would not be appropriate. Certainly Brodie's good faith complaints would not warrant the severe sanction of license revocation. On these facts, the staff correctly concluded that the public interest would not be served by the initiation of a license revocation proceeding against Brodie.

5. For these reasons, IT IS ORDERED, That Custard's application for review IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

FOOTNOTES

[1] A Public Coast Station is a radio station located on land which communicates with marine radio stations located on vessels and connects them with the public telephone network. Public Coast Stations KFN-244 (Custard) and WHF-988 (Brodie) both serve vessels on lakes in the Dallas, Texas area.

[2] Section 705 of the Communications Act of 1934, as amended, 47 U.S.C. 705, which was formerly designated as Section 605, in pertinent part provides:

> "No person not being authorized by the sender shall intercept any radio communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person. No person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by radio and use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto. No person having received any intercepted radio communication or having become acquainted with the contents, substance, purport, effect, or meaning of such communication (or any part thereof) knowing that such communication was intercepted, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of such communication (or any part thereof) or use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto"

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket 84-283

Revision of Part 42, Preservation
of Records of Communication
Common Carriers

ERRATUM

Released: October 2, 1986

On August 22, 1986, the Commission released a *Report and Order* in CC Docket 84-283, FCC 86-367 51 Fed. Reg. 32651 (September 15, 1986), which revised Part 42, Preservation of Records of Communication Common Carriers. Section 42.6 of the Rule is corrected to read as follows:

Sec.42.6 Retention of telephone toll records.

Each carrier that offers or bills toll telephone service shall retain for a period of 18 months such records as are necessary to provide the following billing information about telephone toll calls: the name, address, and telephone number of the caller, telephone number called, date, time and length of the call. Each carrier shall retain this information for toll calls that it bills whether it is billing its own toll service customers for toll calls or billing customers for another carrier.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

The Mountain States Telephone and
Telegraph Company, Northwestern
Bell Telephone Company and Pacific
Northwest Bell Telephone Company

Revisions to Tariff F.C.C. No. 1
Transmittal No. 7

Request for waiver of the Rules to Offer Digicom SwitchNet 56

ORDER

Adopted: October 22, 1986 ; Released: October 27, 1986

By the Chief, Common Carrier Bureau:

1. The Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company and Pacific Northwest Bell Telephone Company (MTN, NWB and PNB) have filed a request for waiver of the Commission's Rules to allow them to offer Digicom SwitchNet 56 (SwitchNet 56) service.[1] The tariff with which the waiver is associated is scheduled to go into effect October 25, 1986. They state that the waiver is necessary to allow the establishment of a separate element for the recovery of costs incurred in providing SwitchNet 56 service.

2. In their waiver request, MTN, NWB and PNB state that SwitchNet 56 is a new service, offering interconnection to interexchange carriers (IXCs) on a digital basis. They describe the service as one which would allow for a connection between the IXC's switch and a suitably equipped end user's premises. The service would be capable of transmitting 56 kbps digital and voice data. They state that SwitchNet 56 service is available only with Feature Group D (FGD) from selectively equipped electronic end offices. The service is intended to be a cost-efficient substitute for private lines. MTN, NWB and PNB originally proposed to recover their revenue requirements through two rate elements: usage from 0 to 4500 minutes per trunk per month and usage above 4500 minutes per trunk per month. The proposed tariff establishes a minimum charging interval of one minute for each element.

3. MCI Telecommunications Corporation (MCI) has filed an "Opposition and Petition to Reject" the waiver request and tariff revisions. MCI contends that the tariff revisions propose a discriminatory and unlawful rate structure. That rate structure, argues MCI, will allow MTN, NWB and PNB to over-recover their subscriber line revenue requirement if more than one IXC carries the SwitchNet 56 traffic. It argues further that the proposed rate structure will short-change the NECA carrier common line (CCL) pool by failing to assess the Commission prescribed nationwide CCL charges on the originating and terminating ends of end user common lines. In addition, MCI contends that MTN, NWB and PNB have not provided documentation to support the proposed tariff treatment of FGD SwitchNet 56 access traffic separately from regular FGD access traffic. Finally, MCI asserts that the cost support material is deficient.

4. MTN, NWB and PNB filed a reply to the MCI petition on September 5, 1986. By Transmittal No. 26, filed pursuant to Special Permission No. 86-744, on October 10, 1986, MTN, NWB, and PNB modified their original proposal. The modified tariff no longer offers a tiered rate structure. Further, the tariff recovers only the interstate costs associated with interstate service.[2]

5. The Common Carrier Bureau has reviewed the waiver request, the tariff revisions, the petition of MCI and the reply filed by MTN, NWB and PNB. The concerns raised by the petitioner have been addressed by the modifications made by MTN, NWB and PNB in Transmittal No. 26. In addition, we do not find deficiencies in the cost support data or methodology that would warrant rejection of the proposed tariff. We also conclude that the public interest will be served by granting the requested waivers of the Part 69 Rules to the extent necessary to implement the proposed tariff revisions. The establishment of a separate rate element for SwitchNet 56 service by MTN, NWB and PNB will provide a reasonable mechanism for the recovery of costs associated with the service.

6. IT IS THEREFORE ORDERED that the petition for waiver filed by the Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company and Pacific Northwest Bell Telephone Company, as modified by the erratum filed on August 13, 1986, IS GRANTED.

7. IT IS FURTHER ORDERED that the opposition and petition to reject filed by MCI Telecommunications Corporation against the Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company and Pacific Northwest Bell Telephone Company Tariff F.C.C. No. 1, Transmittal No. 7, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Albert Halprin
Chief, Common Carrier Bureau

FOOTNOTES

[1] MTN, NWB and PNB filed their waiver petition on August 8, 1986. The petition requested a waiver of Sections 69.205 and 69.206 of the Rules, 47 C.F.R. §§ 69.205 and 69.206. On August 13, 1986, they filed an erratum in which they also requested a waiver of Section 69.4(b) and Subparts B, D and E of Part 69 of the Rules, 47 C.F.R. § 69.4(b) and Part 69, Subparts B, D and E.

[2] The original tariff filing appeared to allocate costs such that MTN, NWB and PNB would recover costs associated with intrastate service through their federal tariff rates and, conversely, interstate costs through their state tariff rates. The modified tariff reallocates costs so that the interstate costs are recovered through the federal rates.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Annual 1987 Access Tariff Filings

ORDER

Adopted: October 20, 1986 ; Released: October 21, 1986

By the Chief, Common Carrier Bureau:

1. Capital Cities/ABC, Inc., CBS, Inc. and National Broadcasting Company, Inc. (the "Networks") and Western Union Telegraph Company (Western Union) have filed motions requesting an extension of time for filing petitions regarding the local exchange carriers' Annual 1987 Access Tariff filings. The motions seek an extension of time until November 18 and November 21, 1986, respectively. The Networks and Western Union assert that it would be almost impossible to participate meaningfully in reviewing the massive tariff filings in the 25 days allowed under the Commission's Rules.[1]

2. The Common Carrier Bureau has reviewed the above-mentioned petitions filed by the Networks and Western Union. We do not find that the petitioners have presented any arguments sufficient to warrant deviation from the Rules and delay of the comment cycle. While we sympathize with the difficulties in assembling and evaluating the massive amounts of material contained in the access filings, the Commission and its staff would face even greater problems in concluding review of the filings within the statutory 90 day review period if the comment cycle were delayed.

3. We do note, however, that we have taken a separate action intended to enhance the opportunity for petitioners to participate in the access tariff review process. We have established a supplemental comment cycle which will enable those persons who file petitions or comments by October 28, 1986 to update their initial filings to reflect new and changed data in the tariff filings (*i.e.*, material submitted by a filing entity after October 3) and to respond to the carriers' replies. These supplemental comments are due on November 20.[2]

4. IT IS THEREFORE ORDERED that the Motions for Extension of Time filed by Capital Cities/ABC, Inc., CBS, Inc. and National Broadcasting Company, Inc., and Western Union Telegraph Company are DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Albert Halprin
Chief, Common Carrier Bureau

FOOTNOTES

[1] *See* § 1.773 (a)(iii) of the Commission's Rules, 47 C.F.R § 1.773 (a)(iii).

[2] *See* Public Notice, Procedures for Filing Errata to Support Information for Annual 1897 Access Charge Tariffs; Modification of Pleading Cycle, released Oct. 21, 1986.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: October 21, 1986

PROCEDURES FOR FILING ERRATA TO SUPPORT INFORMATION FOR ANNUAL 1987 ACCESS CHARGE TARIFFS; MODIFICATION OF PLEADING CYCLE

In a July 25, 1986 letter to all entities filing interstate access tariffs, the Chief of the Common Carrier Bureau pointed out the serious problems created by inaccurate cost and demand data filed in support of annual access filings in past years. Such flawed information, often as corrected by errata filed long after the required annual filing date, seriously detracts from the ability of the Commission and interested persons to evaluate the proposed rates. For this reason, the letter instructed filing entities that whenever it is necessary to file errata to the annual support information, the filing entity must accompany the errata with a request for special permission to make such filing. See also *Commission Requirements for Cost Support Material To Be Filed with Access Tariffs on October 3, 1986*, Mimeo No. 6356, released August 15, 1986.

The annual access tariff filings for 1987 were filed, generally, on October 3, 1986 to provide the required 90 days' notice before the scheduled January 1, 1987 effective date. We have received a request for special permission to file corrections to the October 3 support information from Rochester Telephone Corporation and a number of inquiries from other carriers concerning the procedures for filing errata. The purpose of this Notice is to emphasize and clarify the requirements for filing errata to the annual access tariff support information.

In addition, we have received two requests for extension of the time to file petitions and comments regarding the annual access filings. Western Union requests that the present date of October 28 be extended to November 21; the major television networks (ABC, CBS, and NBC) request an extension to November 18. We address these requests as well.

Types of Errata Requiring Special Permission Requests

Some carriers have asked whether they are required to seek special permission to correct clerical, transcription, and other errors in the filed data which do not represent substantive changes. While we recognize that such minor errors are difficult to avoid in a major data submission, carriers nonetheless are required to request special permission to correct all errors. Even a minor error can impede review and it is important that these corrections be placed in the public record. It would also be difficult and time-consuming to try to identify the classes of minor errata in advance and then evaluate inevitable questions of classification. We do anticipate that special permission will be routinely granted for minor corrections that are filed promptly and represent good faith efforts to correct inadvertant errors.

Form of Filing

The special permission request for an errata filing should be accompanied by either the corrected pages, properly numbered and clearly labeled to indicate the date of the re-submission, the location in the filing, or by a replacement filing including both uncorrected and corrected pages. If special permission is granted, the Commission will issue a special permission number for the errata filing. If the correction includes changes to information on "floppy disks," replacement "floppy disks" should be submitted with the errata filing, clearly labeled to show the date of the re-submission and other identifying information. Both applications for special permission and errata filings should be filed in the same manner as the corresponding material in the October 3 filing. The special permission request should state that it concerns a proposed amendment to the carrier's annual access filing, as designated by the transmittal number and other identifying information. If the special permission request is granted, the carrier should file an amended transmittal using the transmittal number of the October 3 filing if the revisions do not affect rates. If the revisions include any change in a rate, a new transmittal number should be used.

Filing Dates

Errata filings should be made as promptly as possible and in a single, comprehensive filing so far as possible. However, filings containing revised tariff pages should be filed separately from filings containing only revised data. In order to assure adequate time to review the filings and to minimize the need for delay in tariff effective dates, or other corrective action by the Commission, filing entities should file their special permission requests no later than Thursday, October 23, 1986. Although carriers remain obligated to correct the filed data when they identify errors, they should not expect that special permission will be granted with respect to filings at a later date absent a substantial showing of good cause.

Petitions and Comments

Interested persons should include any comments with respect to special permission requests in their general petitions and comments on the access tariffs. The due date for these submissions will continue to be October 28. While we sympathize with the difficulties described by Western Union and the Networks in assembling and evaluating the massive amounts of material contained in the access filings, the Commission and its staff would face even greater problems in concluding its review of the filings within the statutory 90 day review period if the comment cycle were delayed. In recognition of the fact that filings of errata and additional data are expected and that the initial round of comments should provide an opportunity to address the major issues presented by the filings, we will however, establish a supplemental comment round following the carriers' replies due on November 13. These supplemental comments will be limited to persons who filed petitions or comments in the initial round and will be due November 20. Supplemental comments should be limited to updating the initial round of comments to reflect new data and information (*i.e.*, material submitted by a filing entity after October 3), and responding to the carriers' replies.

Rochester Petition

We have reviewed the request for special permission filed by Rochester, and find good cause to grant it, as indicated in the letter attached to this Notice.

For further information, contact:
Carolyn Veal 632-6917
Federal Communications Commission
Washington, D.C. 20554

ATTACHMENTS

October 20, 1986

In Reply Refer To:

Rochester Telephone Corporation
750 Sibley Tower Building
Rochester, New York 14604
Attention: Carol McLain

Re: Application No. 23, October 9, 1986

Dear Ms. McLain:

The Common Carrier Bureau has determined that a grant of the above application is justified. This will enable you to file the material as requested there subject to the conditions stated below.

1. The revised and/or omitted material should be filed under a Transmittal Letter which should be designated as an amendment to the Transmittal Letter filed on October 3, 1986.
2. Do not submit any unrevised pages.
3. You are to file new floppy discs which contain both the unchanged material as well as the revised material. The floppy discs should be labeled to indicate they are revised ones and are to replace the ones originally filed on October 3, 1986.
4. The amended Transmittal Letter, with attachments, and the revised floppy discs should be given the same distribution as your filing made on October 3, 1986.

For this purpose, we assign Special Permission No. 86-765. This grant does not constitute approval by the Commission or Chief, Common Carrier Bureau of the proposed filing, and does not prejudice any subsequent action which the Commission or Bureau may take.

Sincerely,

John Cimko, Jr.
Chief, Tariff Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

Gen. Docket No. 86-336

Inquiry into the Scrambling
of Satellite Television Signals
and Access to those Signals by
Owners of Home Satellite Dish
Antennas

ORDER EXTENDING DEADLINE

FOR FILING REPLY COMMENTS

Adopted: October 30, 1986 **Released: October 30, 1986**

By the Chief, Office of Plans and Policy

1. The Commission has received a "Request for Extension of Time" for reply comments in the above-captioned docket. The National Cable Television Association filed this request on October 29, 1986, asking for a one-week extension.

2. Good cause for an extension having been shown, IT IS ORDERED that effective October 30, 1986, the deadline for reply comments in General Docket No. 86-336 is extended to November 10, 1986. Action is taken pursuant to Section 4(i) of the Communications Act of 1934, as amended, under authority delegated to the Chief, Office of Plans and Policy by Section 0.271 of the Commission's Rules, 47 C.F.R. Section 0.271.

Federal Communications Commission

Peter K. Pitsch
Chief, Office of Plans and Policy

Before the
Federal Communications Commission
Washington, D.C. 20554

Gen Docket No. 86-337

An Automatic Transmitter
Identification System for Radio
Transmitting Equipment

ORDER

Adopted: October 16, 1986 **Released: October 21, 1986**

By the Office of Engineering and Technology:

1. The Electronic Industries Association and the National Electrical Manufacturers Association have requested that the Commission extend the time permitted to file comments on the *Notice of Inquiry* in the above captioned proceedings. To assure that all interested parties have an adequate opportunity to comment, the dates for filing comments and reply comments on the *Notice of Inquiry*, are hereby extended ninety days. Comments and reply comments on the *Notice of Inquiry* may be filed until January 19, 1987, and February 17, 1987, respectively.

2. In response to comments from the National Cable Television Association, the dates for submitting comments and reply comments on the *Notice of Proposed Rulemaking* in this proceeding are extended thirty days. Comments and reply comments on the *Notice of Proposed Rulemaking* may be filed until November 19, 1986, and December 19, 1986, respectively.

3. This action is authorized by sections 4(i), and 303 of the Communications Act of 1934, as amended, 47 U.S.C. Secs.4(i), 303, and Sections 0.31 and 0.241 of the Commission's Rules, 47 CFR Secs. 0.31, 0.241.

Federal Communications Commission

Thomas P. Stanley
Chief, Engineer

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-370

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments, RM-5309
FM Broadcast Stations.
(Versailles, Missouri)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 17, 1986 Released: October 2, 1986

By the Chief, Policy and Rules Division:

1. The Commission has before it a petition for rule making filed by Mid-Mo Broadcasting Company, Inc. ("petitioner"), requesting the allocation of FM Channel 291A to Versailles, Missouri, as that community's first FM broadcast service. However, since that channel conflicts with a pending proposal to allocate Channel 291C2 to Ashland, Missouri (RM-5080), we have substituted FM Channel 236A. Petitioner should indicate a willingness to apply for this channel when filing comments.

2. We believe the proposal warrants consideration. Channel 236A can be allocated to Versailles, in compliance with the minimum distance separation requirements provided there is a site restriction 2.6 kilometers (1.6 miles) northeast of the community. The site restriction will prevent a conflict with Station KBKC, Channel 235, Kansas City, Missouri.

3. In view of the fact that the proposed allocation could provide a second FM broadcast service to Versailles, the Commission believes it is appropriate to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission Rules, with respect to the following community:

City	Channel No.	
	Present	Proposed
Versailles, Missouri	—	236A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. NOTE: A showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be assigned.

5. Interested parties may file comments on or before November 24, 1986 and reply comments on or before December 9, 1986. and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Mid-Mo Broadcasting Company, Inc.
Mr. Kenneth W Raines, Sr.
R.R. #4, Box 86
Eldon, Missouri 65026
(petitioner)

5. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the Table of FM Allotments, Sec.73.202(b) of the Commission's Rules. See, *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to* Am end Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules, 48 Fed. Reg. 11549, published February 9, 1981.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. However, members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all ex p art e contacts are prohibited in Commission proceedings, such as this one, which involve channel assignments. An ex art e contact is a message (spoken or written) concerning the merits of a pending rule making, other than comments officially filed at the Commission, or oral presentation required by the Commission. Any comment which has not been served on the petitioners constitutes an ex p art e presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an ex p art e presentation and shall not b+ considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Charles G. Schott
Chief, Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and reply Comments Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or persons acting on behalf of such parties must be made in written comments, reply comments. or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed.

Such comments and reply comments shall be accompanied by a certificate of service. .(See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street, N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-372

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments, RM-5348
FM Broadcast Stations.
(Winona, Minnasota)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 19, 1986 Released: October 2, 1986

By the Chief, Policy and Rules Division:

1. A petition for rule making has been filed by L.F. Baechler ("petitioner"), seeking the allocation of FM Channel 268A to Winona, Minnesota, as that community's second FM broadcast service. Petitioner submitted information in support of the proposal and stated his intention to file an application for the channel.

2. Channel 268A can be allocated to Winona, Minnesota, in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules provided an application (BPH 850709IK) filed by Station KDWB-FM, Channel 267, Richfield, Minnesota, to relocate its transmitter and increase its facilities to the Class C standards is approved by the Commission. At present, the proposal for 268A would conflict with the current transmitter location for Channel 267 at Richfield and could not be allocated. If allotted, Channel 268A would not be available for application until the proposed Richfield, site change is licensed. It would also be necessary to impose a site restriction on Channel 268A, 8.0 kilometers (5. 0 miles) east of Winona to prevent a conflict with Station KRCH, Channel 269A, Rochester, Minnesota.

3. In view of the fact that the proposed allocation could provide a second FM broadcast service to Winona, Minnesota, the Commission believes it is appropriate to propose amending FM Table of Allotments, Sec.73.202(b) of the Commission's Rules, with respect to the following community:

Community	Channel No.	
	Present	Proposed
Winona, Minnesota	237A	237A, 268A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein.NOTE: A showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be assigned.

5. Interested parties may file comments on or before November 24, 1986 and reply comments on or before December 9, 1986, and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Harry C. Martin
Reddy, Begley and Martin
2033 "M" Street, N.W
Suite 500
Washington, D.C. 20036
(counsel to the petitioner)

5. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the Table of FM Allotments, Sec.73.202(b) of the Commission's Rules. See, *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b)* of the Commission's Rules, 48 Fed. Reg. 11549, published February 9, 1981.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. However, members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all ex parte contacts are prohibited in Commission proceedings, such as this one, which involve channel assignments. An ex parte contact is a message (spoken or written) concerning the merits of a pending rule making, other than comments officially filed at the Commission, or oral presentation required by the Commission. Any comment which has not been served on the petitioners constitutes an ex p art e presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an ex parte presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Charles G. Schott
Chief, Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It

should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and reply Comments Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or persons acting on behalf of such parties must be made in written comments, reply comments. or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed.

Such comments and reply comments shall be accompanied by a certificate of service. .(See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street, N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-406

In re

Amendment of Sections 73.1125 and 73.1130 of the Commission's Rules, the Main Studio and Program Origination Rules for Radio and Television Broadcast Stations — RM-5480

NOTICE OF PROPOSED RULE MAKING

Adopted: October 16, 1986 **Released: October 30, 1986**

By the Commission:

Introduction

1. The Commission has before it for consideration a petition for rule making filed on June 11, 1986, by the Arizona Justice Committee ("AJC"), a self-described "*ad hoc* group of radio licensees."[1] AJC asserts that the current main studio program origination and location rules for radio stations are outdated, unnecessary, and detrimental to providing the best radio service to the listening public.[2] AJC proposes to supplant these rules with the requirement that each radio station "shall maintain an office that is reasonably accessible to the residents of its community of license and shall maintain a main studio within the station's service area." Comments in support of the AJC petition were received from Westinghouse Broadcasting and Cable, Inc., Sunbelt Television, Inc., Cox Enterprises, Inc., Broadco of Texas, Inc., and the National Association of Broadcasters.[3]

2. We agree that the time is ripe to examine the continued desirability of the present main studio rules, and here propose their modification along the lines suggested by AJC. Alternatively, we also propose permitting the main studio to be located anywhere within a station's city grade coverage, or completely eliminating both rules. These requirements were first adopted over 35 years ago. Since that time, we have never directly reviewed their underlying justifications. Thus, an inquiry into whether they continue to serve the public interest is necessary in any event to fulfill our statutory mission. Additionally, the Mass Media Bureau has questioned the need for these rules in its recent report on the AM radio service.[4] The Bureau there asserts that the present rules exalt form over substance and declares that "primary emphasis should be on whether the station is serving the needs of the community and not where the programming originates."[5] Further, our view that market forces will continue to assure that licensees serve their audiences, expressed in our radio and television deregulatory initiatives, undercuts the rationale behind these rules. While the main studio and program origination rules were promulgated originally as a means to ensure that stations met their service obligations to their communities of license, we have more recently eschewed rules and policies which attempt to promote licensee compliance with program-related guidelines by artificial means. Finally, compelling a licensee to maintain a main studio within the community of license and to originate programming from that studio or from a nearby location could, in some cases, impose significant economic burdens that are unjustified and result in the broadcast of less issue-responsive programming, particularly in smaller radio and television markets.

3. The AJC petition addresses the main studio and program origination rules only as they pertain to AM and FM radio broadcast stations. However, in the interest of a consistent and comprehensive reevaluation of these rules, we find it appropriate to expand our inquiry to include television broadcast stations as well. Indeed, the regional service character of television stations, the public interest obligations that flow therefrom, and the sophisticated program delivery systems now in use in that medium may present even stronger arguments for the proposed rule modifications than are present in the radio context.

Revision of Main Studio and Program Origination Rules

4. *Background.* The main studio rules for both radio and television stations were designed originally to give effect to our construction of Section 307(b) of the Act as contemplating "transmission service" as well as reception service. We defined transmission service as "the opportunity which a . . . station provides for the development and expression of local interests, ideas, and talents and for the production of radio programs of special interest to a particular community." *Promulgation of Rules and Regulations Concerning the Origination Point of Programs of Standard and FM Broadcast Stations*, 43 FCC 570, 571 (1950).[6] Our view was that main studio location in the community of license was necessary because it is the location of the studio rather than the transmitter which is of particular significance in connection with transmission service. A station often provides service to areas at a considerable distance from its transmitter but a station cannot serve as a means for local self-expression unless it provides a reasonably accessible studio for the origination of local programs . . . . It is apparent that Section 307(b) and the Commission's efforts to apply it may be largely frustrated if . . . a station . . . removes its main studio to a distant point and originates all or substantially all of its programs in a city or town other than that which it was licensed to serve. *Id.* A similar rationale was employed in the television context. *Television Main Studio Location*, 43 FCC 888 (1952); *see also Rules Governing Standard and High Frequency Broadcast Stations*, 11 Fed. Reg. 33 (1946).

5. In amending these rules in minor respects in 1971, we characterized their purpose thus:

The main studio rules,. . ., are intended to make broadcast stations readily accessible to the people and communities which they are primarily licensed to serve, and they constitute one of the essential ways we have for insuring that stations realistically meet their obligations to serve their communities of license as outlets for local self-expression. *FM - TV Main Studio Rules*, 27 FCC 2d 851 (1971). The main studio and program origination rules have remained unchanged in substance to this day, and the rules have been steadfastly applied. *See Reiteration of Policy Regarding Enforcement of Main Studio Rule*, 55 RR 2d 1178 (1984); *Pappas Telecasting of the Carolinas* (*WHNS* (*TV*)), 60 RR 2d 1394 (1986); *WAVY Television, Inc.*, 102 FCC 2d 1538 (1985); *RKO General, Inc.* (*WRKO*), 57 RR 2d 374 (1984). Deviations from these rules have been permitted rarely.[7] Moreover, we have noted the existence of and purpose behind these rules in eliminat-

ing unnecessary regulatory schemes like the suburban community policy, the *Berwick* doctrine, and the *de facto* reallocation policy. *See Report and Order* in BC Docket No. 82-320, 93 FCC 2d 436, 456 (1983) ("' *Berwick Doctrine' Reconsidered* "), *recon. denied*, 56 RR 2d 835, 839 (1984), *aff' d sub nom. Beaufort County Broadcasting Company v. FCC*, 787 F.2d 645 (D.C. Cir. 1986).

6. *Discussion*. We have tentatively concluded that the main studio and associated non-network program origination rules should be modified or eliminated altogether because their relevance to the provision of service by licensees is questionable in the context of current regulatory policies and broadcast station operations. As noted, these rules were adopted originally because it was believed that station operations in the public interest would be furthered by a governmentally mandated requirement that a station's main studio be accessible to residents of the community of license. We now believe that this rationale, as a practical matter, may no longer be valid. While transmission service will continue to be considered for Section 307(b) purposes, *see supra* para. 5, we do not see a causal relationship between the main studio rules and the provision of service to the community of license which is sufficient to warrant their retention.

7. First, a question exists as to whether the accessibility of the main studio to the community of license actually increases interaction between a station and the residents in its service area. As the Mass Media Bureau has remarked:

[I]t appears more likely that local residents would phone rather than visit the station to register any complaints about programming or [to] suggest programming to meet needs and issues of concern in the community. In all likelihood, management personnel at the station would arrange a meeting to pursue these matters a time and place convenient to the local residents. . .

AM Status Report, *supra* note 2, at 40. Also, as a station must identify issues of importance to its community and program accordingly, it is reasonable to assume that the station will take the initiative in contacting its listenership or viewership, whether by telephone, by mail, through participation in clubs or other community organizations, or through some other form of personal contact.

8. Moreover, the development of technical advances in the production and transmission of programming has severely eroded the role of a main studio and, by extension, the non-network program source rule. When the rule requiring that more than 50 percent of all non-network programming originate from the main studio was adopted, most, if not all, of the non-network programming broadcast necessarily originated in the station's main studio. However, radio and television stations now make extensive use of portable recording and transmission equipment, and can in essence bring a "studio" to any location in or out of its service area. Consequently, programs are originated now at the main studio only in the most technical sense; for example, the Mass Media Bureau points out that in the case of AM radio, origination at the main studio largely consists of playing tapes previously recorded at remote locations. *AM Status Report* at 41.

9. We also suspect that there may be substantial compliance costs associated with these rules. Requiring the location of a station's main studio in its community of license could have a significant economic impact on its operations in certain circumstances. For example, this rule could operate to forbid a licensee from upgrading its main studio facilities by relocating to a less expensive location outside the community of license. Also, the present main studio rule proscribes co-location of commonly owned AM and FM radio stations not licensed to the same community, even in a case where the stations serve substantially the same market or the communities of license are adjacent to one another. Consequently, the stations' owner must engage in considerable extra expense to use and maintain two main studios, even when their co-location would promote operational efficiency and permit the use of additional station resources for the coverage of local affairs in the community of license.[8] The program origination rule also appears to impose costs by restricting the origination point from which non-network programming is sent to the station's transmitter. In doing so, it appears unlikely that these costs produce any public benefit in terms of the value listeners and viewers perceive from the station's actual output.

10. Practical considerations of these kinds have led us to revise other programming-related policies. In our radio and television deregulation proceedings, we determined that the public interest would be served by the elimination of non-entertainment programming and commercialization guidelines and by the deletion of formal ascertainment and program log requirements.[9] We found that market incentives assure generally that licensees will present programming responsive to their communities, and that revision or deletion of these policies would eliminate unnecessary costs and burdens on both licensees and the Commission. We stated that elimination and revision of these policies would provide broadcasters "with increased freedom and flexibility in meeting the changing needs of their communities."[10]

11. In reevaluating other related rules, guidelines and requirements, we have sought to "assure that our rules and regulations are kept relevant to a technology and industry that are subject to rapid and dynamic change." *Deregulation of Radio*, 84 FCC 2d at 969. We determined for both radio and television broadcasting that the public interest did not require guidelines as to particular amounts of issue-responsive programming, or designation of specific categories of issues. Instead, we required only that a station "program to address those issues that it believes are of importance to the general community or, depending upon the availability of other radio services in the community, to its own listenership." *Deregulation of Radio*, 84 FCC 2d at 982; *see also Deregulation of Television*, 98 FCC 2d at 1094. Because we have found that prescription of the amounts or types of issue-responsive programming licensees present is contrary to the public interest, it makes little sense as a policy matter to retain rules which mandate *where* a percentage of that programming must originate.[11]

12. *Comments*. With all these considerations in mind, we request comment on elimination of the program origination rule, modification of the main studio rule to provide that a station's main studio be located within its city grade contour or within its service area[12] or, alternatively, elimination of the main studio rule. We recognize that in the past the Commission has utilized these rules as a means of implementing the mandate of Section 307(b) of the Act. Given the substantial changes in the telecommunications marketplace noted above, and the current widespread availability of broadcast service nationwide, we now question the need for these rules in implementing Section 307(b). Commenters should focus, therefore, on whether retention of the main studio pro-

gram origination and location rules are still required to implement Section 307(b) of the Act, and should present specific analysis and citations in support of their arguments. Regarding the non-network origination rule, comments are requested as to whether such a rule is necessary to assure that the interests of listeners and viewers are responded to in terms of the issue-responsive programming requirement or otherwise. Also, information is sought on how broadcast licensees now program to satisfy the program origination rule, and on the nature of costs imposed on licensees as a result of this rule. Commenters should further address whether the main studio rule should be modified in the manner described by AJC, in some other manner, or should be abolished entirely. Comment is also requested on whether radio and television present equally meritorious cases for modification or elimination of these rules, and, if not, how and on what basis our proposals should be tailored to suit these respective media. Information also is requested on the manner in which broadcast stations now contact and are contacted by their audiences with respect to the presentation or contemplation of issue-responsive non-entertainment programming, and the costs involved in complying with the main studio rule. Finally, whether modification or elimination of the main studio rule is urged, commenters should discuss whether some other local presence, *e. g.*, an office, in the community of license or accessible to the community of license should be required, as suggested by AJC.

Administrative Matters

13. Authority for this proposed rule making is contained in Sections 1, 3, 4(i) and (j), 303, 308, 309 and 403 of the Communications Act of 1934, as amended. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before December 22, 1986, and reply comments on or before January 6, 1987. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments provided that such information or a writing indicating the nature and source of such information is placed in the public file, and provided that the fact of the Commission's reliance on such information is noted in the *Report and Order*.

14. For purposes of this nonrestricted notice and comment rule making proceeding, members of the public are advised that *ex parte* contacts are permitted from the time the Commission adopts a notice of proposed rule making until the time a public notice is issued stating that a substantive disposition of the matter is to be considered at a forthcoming meeting or until a final order disposing of the matter is adopted by the Commission, whichever is earlier. In general, an *ex parte* presentation is any written or oral communication (other than formal written comments/pleadings and formal oral arguments) between a person outside the Commission and a Commissioner or a member of the Commission's staff which addresses the merits of the proceeding. Any person who submits a written *ex parte* presentation must serve a copy of that presentation on the Commission's Secretary for inclusion in the public file. Any person who makes an oral *ex parte* presentation addressing matters not fully covered in any previously filed written comments for the proceedings must prepare a written summary of that presentation on the day of oral presentation. That written summary must be served on the Commission's Secretary for inclusion in the public file, with a copy to the Commission's official receiving the oral presentation. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. *See generally*, Section 1.1231 of the Commission's Rules, 47 C.F.R. Section 1.1231 (1985).

15. As required by Section 603 of the Regulatory Flexibility Act, the FCC has prepared an initial regulatory flexibility analysis (IRFA) of the expected impact of these proposed policies and rules on small entities. The IRFA is set forth in Appendix A. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the *Notice*, but they must have a separate and distinct heading designating them as responses to the regulatory flexibility analysis. The Secretary shall cause a copy of this *Notice*, including the initial regulatory flexibility analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.* (1981).

16. The proposals contained herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose no new or modified requirement or burden upon the public. Implementation of any new or modified requirement or burden will be subject to approval by the Office of Management and Budget as prescribed by the Act.

17. To file formally in this proceeding, participants must file an original and five copies of all comments, reply comments, and supporting documents. If participants want each Commissioner to receive a personal copy of their comments, an original plus eleven copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

18. For further information on this proceeding, contact Terry L. Haines, Mass Media Bureau, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

APPENDIX

Initial Regulatory Flexibility Analysis

I. Reason for Action

In this proceeding, we seek to develop a record and to elicit comments on modification or elimination of the main studio rule and elimination of the local program origination rule for radio and television broadcast stations. These rules were promulgated originally to ensure

that broadcast stations served their audiences. However, we now question whether these rules are necessary to meet that end.

II. Objective

The proposed rule changes are designed to modify or eliminate rules which are of doubtful utility in providing broadcast service to the listening and viewing public. This proceeding will elicit comments on the public interest benefits and costs of the proposed rule changes in accordance with the Communications Act of 1934, as amended.

III. Legal Basis

The legal basis for eliciting comments on these proposals to change our rules is found in Sections 4 and 303 of the Communications Act.

IV. Description, Potential Impact, and Number of Small Facilities Affected

Modification or elimination of these rules would result in wider discretion for all broadcast licensees in situating their main studios and in choosing programming to serve their audiences. Consequently, the overall costs involved in construction and operating a broadcast station could be reduced.

V. Recording, Record Keeping and Other Compliance Requirements

There is no additional impact.

VI. Federal Rules which Overlap, Duplicate or Conflict with the Proposed Rules

There is no overlap, duplication or conflict.

VII. Any significant Alternative Minimizing Impact on Small Entities and Consistent with Stated Objectives

There is no significant alternative.

FOOTNOTES

[1] The members of AJC are: Beasley Broadcast Group, Capitol Broadcasting Corporation, Communication Enterprises, Inc., Dick Broadcasting Company, Inc., Fuller-Jeffrey Group, Hicks Communications, Inc., Joyner Broadcasting Company, Keymarket Communications Group, Metroplex Communications, Sconnix Broadcasting Company, Swanson Broadcasting, Twin Cities Broadcasting, Westcom, Ltd., and WHAL-WYCQ Radio Stations.

[2] The two rules in question are Sections 73.1125 and 73.1130. Section 73.1125 states: (a) Each AM, FM and TV broadcast station shall maintain a main studio in the station's principal community which it is licensed to serve, except: (1) AM stations licensed as synchronous amplifier transmitters ("AM boosters") or, (2) AM stations whose main studio is located at the station transmitter which is situated outside the station's principal community of license or, an FM station, commonly owned with such AM station, and licensed to the same principal community, whose main studio may also be co-located at the commonly owned AM station's transmitter or, (3) AM, FM or TV stations, when good cause exists for locating the main studio outside the principal community to be served and that to do so would be consistent with operation of the station in the public interest. (b) Relocation of the main studio may be made: (1) From one point to another within the principal community or from a point outside the principal community to one within it, without specific FCC authority, but notification to the FCC in Washington shall be made promptly; however, (2) From a point within the principal community to one outside it or from one such point outside the community to another, only by first securing modification of construction permit or license. (FCC Forms 301 for commercial stations and 340 for noncommercial educational stations.) (3) Two exceptions to paragraph (b)(2) of this section are: (i) AM stations moving their main studio to their transmitter site wherever it is located; and, (ii) FM station, commonly owned with an AM station, and licensed to the same community, whose main studio is co-located. (iii) Notification to the FCC in Washington shall be made promptly of such relocations described in paragraphs (b)(3) (i) and (ii) of this section. (c) Where the principal community to be served does not have specifically defined political boundaries, applications will be considered on a case-by-case basis by the FCC to determine if the main studio is located within the principal community to be served.
Section 73.1130 states: (a) More than 50% of an AM, FM or TV station's non-network programs shall originate from the station's main studio or from points which are remote from the main studio so long as such origination points are situated in the principal community which the station is licensed to serve. (b) Such originations shall be computed on the basis of total duration or total length of time of programs, and not on the number of separate programs.

[3] Sunbelt Television, Inc. supports expansion of the inquiry to include UHF television stations; Broadco of Texas, Inc., comments on the AJC petition only insofar as it relates to permitting co-location of commonly owned AM and FM stations licensed to different communities.

[4] *Report on the Status of the AM Broadcast Rules* ("*AM Status Report* "), RM-5532, released April 3, 1986 (M.M.Bur.)

[5] *Id.* at 41.

[6] The courts have also addressed these requirements as they relate to Section 307(b). *See Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413 (D.C. Cir. 1983); *FCC v. WNCN Listeners Guild*, 450 US 582 (1981).

[7] *See, e.g., Jersey Cape Broadcasting Corporation*, 85 FCC 2d 655 (1981), *recon.* denied, 89 FCC 2d 984 (1982)(commercial TV station permitted to locate main studio 10 miles from community of license after assignment of license where assignment would sever station from AM/FM/TV combination and relocation would result in substantially improved facilities; main studio remained accessible to residents of community of license); C entral Virginia Educational Television Corporation, 49 RR 2d 435 (1981) (noncommercial educational TV station applicant permitted to locate main studio 3 miles outside community of license where applicant operated another such station from studio location and would realize considerable cost savings thereby; main studio still accessible to community residents); Arizona Communications Corporation, 25 FCC 2d 837 (1970), recon. denied, 27 FCC 2d 283 (1971) (recorded music exempted from local program origination rule as long as a majority of news and public affairs programming originated from main studio in community of license).

[8] We also note that requests for waiver of the main studio rules involve the Commission in an artificial and highly subjective determination into when a station's main studio is or is not "accessible" to its community of license. See, *e.g.*, cases cited *supra* n.6.

[9] Deregulation of Radio, 84 FCC 2d 968 (1981), recon. denied in part, 87 FCC 2d 797 (1981), *aff'd* in relevant part, Office of Communication of the United Church of Christ v. FCC, 707 F.2d 1413 (D.C. Cir. 1983)("UCC"); Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, 98 FCC 2d 1076 (1984)("Deregulation of Television"), recon. denied, 104 FCC 2d 357, 60 RR 2d 526 (1986), appeal pending sub nom. Action for Children's Television v. FCC, No. 86-1425 (D.C. Cir., filed July 25, 1986).

[10] Deregulation of Television Reconsideration, supra, 104 FCC 2d at , 60 RR 2d at 527.

[11] Also, our current regulatory posture presumes that a licensee will serve its community of license, absent evidence to the contrary. See, e.g., "Berwick Doctrine" Reconsidered, supra para. 5; see also Suburbanaire, Inc.(WAWA(AM)), 60 RR 2d 1326, 1330 n.12 (Rev. Bd. 1986), petition for recon.pending (filed September 2, 1986).

[12] "Service area" would be defined as the Grade B contour of a FM radio ortelevision station, or the 1 mV/m contour of an AM radio station.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 83-1094

MARGARET J. HANWAY File No. BPH-820510AL
Fairmont, West Virginia

For Construction Permit
for a new FM Station

ERRATUM

Released: November 4, 1986

The Order, FCC 86-476, released November 4, 1986 in the above-entitled matter is corrected to include "MM Docket No. 83-1094" in the caption.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

November 5, 1986

TARIFF DIVISION ACTION ON REQUESTS TO REVISE OCTOBER 3, 1986 ACCESS TARIFF FILINGS

On October 21, 1986, the Chief of the Common Carrier Bureau released a Public Notice which established procedures for filing errata to the October 3, 1986 access tariff filings. The Notice also required that any errata be accompanied by a request for special permission to change the material submitted October 3 while maintaining the scheduled January 1, 1987 effective date. The Attachment to this Notice lists applications for special permission which were filed, generally on October 23.

After review of these requests, which primarily involved corrections to support data which do not affect rates, the Chief of the Tariff Division granted all of the listed requests by letters, with one partial exception. The National Exchange Carrier Association (NECA) submitted revised data relevant to calculating the industry-wide Carrier Common Line (CCL) rates, and requested permission to file a tariff transmittal proposing an increase in the premium CCL rate from the requested 2.05 cents per originating minute to 2.07 cents. By letter, NECA was granted permission to revise its October 3 support information; however, action on the specific rate change was deferred. Adjustments to the CCL rates to reflect factors such as demand stimulation are expected to more than offset this upward adjustment. An adjustment for this single factor thus appears to be premature, even if it proves justified.

This Notice describes the procedures for filing errata updates and gives notice of the review cycle. All parties granted special permission were directed to submit those filings by November 3, 1986. In addition to errata, some carriers also requested special permission to file amendments to tariff language. These requests were also granted, subject to further review of the amendments, as part of the carriers' overall filings of revisions. Carriers required to submit support information on computer diskettes should submit a single set of diskettes showing all data in final form, *i.e.*, with all new or revised data included.

The October 21 Public Notice established a date of November 20 for comments supplementing the petitions filed on October 28 addressing the October 3 filings. These supplemental comments should address all issues presented by both the errata and the proposed changes in the tariffs in lieu of the normal period for petitions against tariff filings. We will not consider separate petitions for rejection or suspension of the October 3 filings or of the revisions. No further comments or replies are anticipated.

For further information, contact Diane Shaw, Tariff Division, (202) 632-6917.

Errata Applications*

CARRIER	APPLICATION NO.
1. Ameritech	28
2. Ameritech (filed 10/29/86)	28 amended
3. Anchorage Tel. Utility	19
4. Bell Atlantic	45
5. Bell Atlantic (filed 10/30/86)	46
6. BellSouth	15
7. BellSouth	16
8. Centel	30
9. Centel (filed 10/29/86)	31
10. Centel (filed 10/30/86)	32
11. Chillicothe Tel. Col.	3
12. Cincinnati	57
13. Contel	20
14. Contel (filed 10/27/96)	21
15. Contel (filed 10/29/86)	22
16. GTE	83
17. GTE (filed 10/27/86)	83 amended
18. Lincoln Tel. & Tel.	4
19. Mountain/Northwestern/Pacific Northwest (US West)	21
20. NECA	71
21. New England Tel (filed 10/29/86)	56
22. New York Tel.	96
23. Orchard Farm	10
24. Orchard Farm	11
25. Pacific	113
26. Rochester	24
27. Southern New England	37
28. Southwestern Bell	120
29. Union (GVNW)	3
30. United Telephone System	19

* filed 10/23/86 unless otherwise noted.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: November 4, 1986

PRIVATE LAND MOBILE APPLICATION PROCEDURES FOR SPECTRUM IN THE 896-901 MHZ AND 935-940 MHZ BANDS

I. Introduction

On September 26, 1986 the Commission released a *Report and Order* in General Docket No. 84-1233 that allocated 399 channel pairs in the 896-901 MHz and 935-940 MHz bands for use by the private land mobile radio services. In that proceeding, we indicated that this spectrum would be divided into three pools as follows: (1) 200 channel pairs for Specialized Mobile Radio (SMR) Systems; (2) 100 channel pairs for the Business Radio Service; and (3) 99 channel pairs for the Industrial and Land Transportation Radio Services. While this is a nationwide allocation, the *Report and Order* determined that applications for the SMR pool would be accepted initially only in the 50 largest markets of the country in order to assure that service is provided first to areas most in need of additional mobile communications.

This public notice delineates the specific application procedures that must be followed and opens filing windows for this new spectrum. We are limiting applications for SMR channels to the 50 largest markets because we intend to provide service first to the largest metropolitan areas, which have experienced the most serious shortages of spectrum. During this phase of SMR filings only, market rankings will be used, where necessary, to establish priorities among the markets. In a limited number of situations, discussed below, license holders in lower ranked markets will be required to configure their systems to protect previously granted systems in higher ranked markets. This priority to SMR systems in higher ranked markets will apply only during the initial assignment of these new channels. Applications will be accepted for filing for channels in the Business and Industrial/Land Transportation pools only for systems to be located at least 100 miles (160 km) from the Canadian border and 68.4 miles (110 km) from the Mexican border. Applications for SMR channels may be filed for systems to be located within these border areas, consistent with the filing areas specified in Appendix I. However, no license grants will be made for applications in these border areas pending further discussion with the adjacent country. Furthermore, no licenses will be granted until type accepted base and mobile equipment is available for operation on these new channels under the technical parameters specified in the *Report and Order*.

II. Procedures for Business and Industrial/Land Transportation Pool Applications

All applications for a license in the Business or Industrial/Land Transportation pools must specify the channel(s) requested and must include evidence of frequency coordination from the National Association of Business and Educational Radio, Inc. (NABER) for the Business pool, or the Special Industrial Radio Service Association (SIRSA) for the Industrial/Land Transportation pool. Applications for these non-SMR facilities will be granted on a first-come, first-served basis. *See* 47 C.F.R. §90.611. Applicants are reminded that all applications for channels in the Business or Industrial/Land Transportation pools must be submitted directly to the appropriate frequency coordinator on FCC Forms 574 and 574-A and must contain an original handwritten signature and a completed eligibility statement (item #31 on the Form 574) in order to be acceptable for filing. Further, applicants are hereby notified that item #20 on the FCC Form 574 must be completed as follows: *GU* for conventional systems in the Business pool, *YU* for trunked systems in the Business pool, *GI* for conventional systems in the Industrial/Land Transportation pool, and *YI* for trunked systems in the Industrial/Land Transportation pool. Applications for facilities in these pools to be located anywhere in the United States, except in the border areas discussed above, may be submitted to the appropriate frequency coordinator beginning *December 1, 1986*.

III. Procedures for SMR Applications

A. Designated Filing Areas

Applications for SMR facilities will be processed using a two phase process. During Phase I, under procedures set forth in this Public Notice, SMR applications will be accepted for facilities located within "Designated Filing Areas" (DFAs) for each of the nation's top 50 markets. Appendix I sets out the DFA definitions and rankings. Applicants for facilities within a DFA must specify the DFA they propose to serve but need not specify their proposed base station transmitter site. Generally, the DFA approximates the boundaries of each market's Metropolitan Statistical Area (MSA), as defined by the Census Bureau. During Phase II, which will occur after the processing and granting of applications for facilities in the DFAs, applications will be accepted for SMR facilities located within a 100-mile radius of the urban center of each of the top 50 MSAs. Procedures for this second phase filing will be stated in a future Public Notice.

The purpose of only accepting applications during Phase I for facilities proposing to serve DFAs is to execute the *Report and Order*'s mandate to "allow service to be provided first in the areas most in need of additional communications capacity." *Report and Order* at para. 80. This approach will expedite service to the public by avoiding much of the overlap of market areas that delayed the processing of applications for the previous 800 MHz channel release in 1982.

In certain instances where markets are located in close proximity to each other, such as Boston, MA and Providence-Pawtucket, RI or Washington, DC and Baltimore, MD, we have combined them into a single Designated Filing Area. Where we have combined the two markets, the rank of the higher ranking market will be assigned to the combined DFA. For example, Boston is ranked #7 and Providence is ranked #34, so the combined Boston-Providence DFA is ranked #7; similarly, the combined Washington-Baltimore DFA is ranked #9.

B. Filing Requirements for Phase I

Applications for 900 MHz SMR systems must be filed on FCC Form 574. (SMR applicants should *not* file the Form 574-A.) Applications are to be submitted to the Federal Communications Commission, Gettysburg, PA

17325, pursuant to 47 C.F.R. §90.605. SMR applicants may apply for a maximum of 10 channels. Since the FCC will be assigning specific frequencies, applicants should not specify requested frequencies on the application form. Applicants need not specify the base station transmitter site they will employ, nor need they complete any information on the Form 574 relating to the proposed transmitter site (e.g., information regarding environmental impact and FAA clearance). Specifically, SMR applicants must complete the entire FCC Form 574, with the exception of items 1 through 19, items 26 through 29, and items 34 through 36 for the application to be acceptable for filing. SMR applicants must use the service code *YS* to complete item #20 on the Form 574. The FCC will require more information concerning the transmitter site from tentative selectees.

Applicants are reminded that the eligibility statement on the Form 574 (item #31) must be completed. Each applicant must state it is eligible pursuant to 47 C.F.R. §90.603(c) to provide commercial service to Part 90 eligibles.

We will not accept applications electronically transmitted to the Commission's Gettysburg office. The handwritten ink signature of the applicant must appear on the original of the Form 574. To facilitate the processing of applications, the handwritten ink signature on the original must be clearly distinguishable from the signature on the copies. Any application without a handwritten ink signature will be dismissed as defective.

Each applicant must provide an 8 1/2 x 11 inch cover sheet accompanying its application stating the name of the applicant, its mailing address, the ranked DFA it is proposing to serve, the number of channels requested, and that the application is for SMR facilities in the 900 MHz band. An example follows:

XYZ CORPORATION
123 MAIN STREET
GETTYSBURG, PA 17000

MARKET #3 - CHICAGO, IL

10 CHANNELS

900 MHZ SMR APPLICATION

Each applicant must submit an original plus two (2) copies of its application, including copies of its cover sheet. Any application submitted without the required two copies, including the cover sheets, will be dismissed as defective.

Any application filed earlier than the window's opening date will be dismissed. Any application filed later than the window's closing date will be dismissed.

C. Multiple Applications

Only one application per entity or individual will be accepted for each DFA. This is to prevent the filing of multiple applications by the same parties in an attempt to "stuff the lottery box." Applicants are cautioned that if multiple applications have been filed, ***all*** applications filed by these applicants will be dismissed. Applicants are further cautioned that their applications will be processed based on representations made during the application process. Any license issued on the basis of false representations may be set aside.

Rule 90.123 requires that each applicant make full and complete disclosures with regard to real party or parties in interest. Applicants must certify that they have no prohibited financial interests or relationships with other applicants. The certification must address:
(1) Direct or indirect interests by any participant in the application in other applications in the same DFA.
(2) Familial or marital relationships with participants in other applications in the same DFA.
(3) Current or recent employment relationships with other applicants in the same DFA.
(4) Agreements with others concerning the application filed.

Appendix II of this Public Notice lists suggested formats for the required certification for individual, corporate, and partnership applicants. Use of the Appendix II format is not mandatory, but any certification filed must address all these points and use of the Appendix II format will speed up application processing. Appendix II may be copied for submission by applicants.

Multiple applications for systems in the same DFA filed by employers and their employees or by members of the same family will be scrutinized and may be considered *prima facie* evidence of an attempt to circumvent the one application per DFA limitation. If applicants against whom substantial allegations about multiple applications have been raised wish to pursue their applications, the applications may be designated for hearing. Adverse findings may raise questions regarding applicants' basic qualifications and their eligibility to retain any previously issued Commission licenses. Applicants filing multiple applications are also subject to the imposition of the maximum monetary forfeiture of $5,000 authorized by Section 503 of the Communications Act of 1934, as amended.

D. Amendments to Applications

Applications may be amended during the five-day window established for the DFA for which the application has been filed. To reduce unnecessary paperwork and expedite application processing, additional permissible amendments may be made only after an applicant has been notified of its tentative selection.

E. Processing Procedures for SMR Applications

All applications filed during a window for a particular DFA will be considered together as if they were filed on the same day. Following the close of each window, a Public Notice will be issued listing the applications submitted for each DFA. In that Public Notice we will be soliciting information regarding the suitability of applicants to be licensees. We will be particularly interested in information regarding any applicants that may be in violation of the limitation of one application per DFA.

if there are sufficient channel blocks available for all applications submitted for a DFA, then applications will be granted after the resolution of any concerns regarding the suitability of any applicant to hold a Commission license. If there are not sufficient frequencies available to grant all applications submitted for a DFA, then lottery proceedings will be held pursuant to 47 C.F.R. §1.972 to rank order the applications. A Public Notice will be issued following the lottery listing the top 40 ranked applications for each DFA. Tentative selections will be made based on lottery ranking. The remaining ranked applications will be alternates. Applications ranked below 40 will be dismissed.

F. Selection of Transmitter Sites

Tentative selectees will have 90 days after notification of their tentative selection to provide the Commission with information regarding the specific site for their base station transmitters. Tentative selectees are cautioned that the geographical coordinates of the location of the proposed system's base station transmitters must be accurate and must be within the DFA. Additionally, the street address and county or city name describing the base station transmitter site must be within the DFA. If the transmitters' coordinates and the street address and county or city name are not located within the DFA, the tentative selectee's application will be dismissed.

If a tentative selectee fails to provide the Commission with the necessary transmitter site information within 90 days of its selection, its application will be dismissed.

G. Special Requirements for Closely Spaced DFAs

There are several instances where the distance from the edge of one DFA to the edge of a neighboring DFA is less than 70 miles. We have developed two approaches to resolve any mileage separation conflicts that may be caused by the close spacing of DFAs. For brevity, we will refer to this problem as one of "overlapping DFAs".

Negotiation Procedures for Seven Specified Pairs of DFAs

First, for the following 7 pairings of DFAs which overlap by significant amount, we will require that tentative selectees in the overlapping DFAs negotiate with each other to identify transmitter sites and/or operating parameters (e.g., directional antennas, etc.) that will enable the Commission to make grants in both DFAs.

DFAs Where tentative Selectees Must Negotiate With Each Other

#1 New York and #4 Philadelphia
#3 Chicago and #24 Milwaukee
#20 Tampa-St. Petersburg and #47 Orlando
#23 Cincinnati-Dayton and #28 Columbus
#29 Norfolk and #49 Richmond
#31 Buffalo and #38 Rochester
#35 Charlotte and #45 Greensboro

Each tentative selectee in these DFAs has 90 days from the date of its notification as a tentative selectee to reach an agreement regarding the location of its base station transmitter with any tentative selectee in the neighboring DFA. To aid this negotiation process, the Commission will issue a public notice with the name, address and telephone number of each tentative selectee in the two neighboring DFA's. While we anticipate most parties will locate their transmitters in accordance with the 70-mile co-channel separation standard, the Commission will accept any agreements providing for the "short spacing" of systems.

As agreements between pairs of applicants are received by the Commission and transmitter sites are identified, co-channel grants will be made. Tentative selectees may request a specific block of frequencies at this time and the Commission will try to accommodate such requests.

If applicants do not reach agreements within the prescribed 90-day period, each applicant that has not reached an agreement must inform the Commission of its preferred location for a base station transmitter no later than the 90th day. The Commission will then hold a "stalemate" lottery to rank order these applicants. This lottery will determine the order of priority to be given the selectees' sites. A license grant will then be made to the top ranked applicant. The second ranked applicant will then have 30 days in which to submit a base station transmitter site that will protect the top ranked applicant in the "stalemate" lottery based on the 70-mile co-channel separation standard. Any additional applicants will have 30 days from notification of the site selections of higher ranked applicants to submit a transmitter location that protects the sites of all applicants ranked higher in the "stalemate" lottery. Failure to provide a transmitter location to the Commission within the prescribed time period will result in dismissal of the application.

Protection for Higher Ranked DFAs

The second type of overlap problem concerns DFAs that are sufficiently separated so that grants with the required separations can be made throughout most but not all of the areas encompassed by both DFAs. In such situations, grants will be made to the higher ranked DFA first. The neighboring lower ranked DFA will then be processed. This will allow sufficient time for tentative selectees in the lower ranked market to select transmitter sites that will not interfere with co-channel systems in the higher ranked market. The lower ranked DFAs that must protect higher ranked DFAs are set out below:

#9 Washington-Baltimore must protect #4 Philadelphia
#19 San Diego must protect #2 Los Angeles
#32 Indianapolis must protect #23 Cincinnati-Dayton
#36 Hartford must protect #1 New York and
#7 Boston-Providence
#39 Louisville must protect #23 Cincinnati-Dayton
#46 Albany must protect #36 Hartford

H. Special Requirements for Transmitters Serving the Los Angeles DFA

Applicants granted licenses to serve the Los Angeles DFA that employ base station transmitters located on Santiago Peak and other peaks located south of 33 degrees 45 minutes North latitude will have special conditions attached to their licenses requiring that they protect subsequent grants to serve the San Diego DFA.

I. Status of Ranked Applications

In cases in which the application of a tentative selectee has been dismissed, the next ranked applicant for that DFA will be notified that it has been tentatively selected. After all license grants are made for each DFA, the remaining applications from the original top 40 ranked applications for that DFA will be dismissed.

J. Markets, Filing Windows and Dates

Applications for SMR facilities to serve the top 50 ranked DFAs will be accepted during specific windows as set forth below. *The dates for Windows # 2 through # 4 are tentative.*

WINDOW #1 - OPENS: DECEMBER 8, 1986 CLOSES: DECEMBER 12, 1986

Markets: New York, Los Angeles, Chicago, Milwaukee, Philadelphia, and San Francisco-Sacramento.

WINDOW #2 - OPENS: JANUARY 26, 1987 CLOSES: JANUARY 30, 1987

Markets: Detroit, Boston-Providence, Houston, Washington-Baltimore, Dallas-Fort Worth, Miami, Cleveland, St. Louis, Atlanta and Pittsburgh.

WINDOW #3 - OPENS: FEBRUARY 23, 1987 CLOSES: FEBRUARY 27, 1987

Markets: Minneapolis-St. Paul, Seattle, San Diego, Tampa-St. Petersburg, Orlando, Denver, Phoenix, Cincinnati-Dayton, Columbus, Kansas City, Portland, New Orleans, Norfolk, Richmond, Buffalo and Rochester.

WINDOW #4 - OPENS: MARCH 23, 1987 CLOSES: MARCH 27, 1987

Markets: Indianapolis, San Antonio, Charlotte, Greensboro, Hartford, Salt Lake City, Louisville, Oklahoma City, Memphis, Birmingham, Nashville, Albany, Honolulu, and Jacksonville.

Appendix I to this Public Notice contains the Designated Filing Areas for each of the top 50 markets. Applicants are cautioned to closely examine the DFA for each market in which they propose to locate SMR facilities. All tentative selectees determined as a result of any Phase I filing window must locate their facilities inside the DFA for which they have applied.

IV. Further Information

For further information concerning these procedures, contact Harold Salters, Land Mobile and Microwave Division, Private Radio Bureau, (202) 632-7597.

APPENDIX I

DESIGNATED FILING AREAS FOR TOP 50 MARKETS *

1. NEW YORK
Bronx County, NY
Kings County, NY
Nassau County, NY
New York County, NY
Queens County, NY
Richmond County, NY
Bergen County, NJ
Essex County, NJ
Hudson County, NJ
Union County, NJ

2. LOS ANGELES
Los Angeles County, CA
Orange County, CA
Riverside County, CA
Ventura County, CA

[The Los Angeles DFA includes only that portion of Riverside County that is North of 33 degrees, 40 minutes north latitude and West of 117 degrees, 20 minutes west longitude.]

3. CHICAGO
Cook County, IL
Lake County, IN

4. PHILADELPHIA
Bucks County, PA
Montgomery County, PA
Philadelphia County, PA
Burlington County, NJ
Camden County, NJ

* The counties, or portions thereof, included under each DFA name define the geographic area in which a transmitter site may be located to serve that DFA.

5. SAN FRANCISCO combined with 30. SACRAMENTO
Alameda County, CA
Contra Costa County, CA
Marin County, CA
Sacramento County, CA
San Francisco County, CA
San Mateo County, CA
Santa Clara County, CA
Santa Cruz County, CA
Solano County, CA

6. DETROIT
Macomb County, MI
Oakland County, MI
Wayne County, MI

7. BOSTON combined with 34. PROVIDENCE
Bristol County, MA
Essex County, MA
Middlesex County, MA
Norfolk County, MA
Plymouth County, MA
Suffolk County, MA
Kent County, RI
Providence County, RI

8. HOUSTON
Brazoria County, TX
Fort Bend County, TX
Galveston County, TX
Harris County, TX
Liberty County, TX
Montgomery County, TX
Waller County, TX

9. WASHINGTON DC combined with 16. BALTIMORE
Washington, DC
Alexandria City, VA
Arlington County, VA
Fairfax City, VA
Fairfax County, VA
Falls Church City, VA
Ann Arundel County, MD
Baltimore County, MD
Baltimore City, MD
Howard County, MD
Montgomery County, MD
Prince Georges County, MD

10. DALLAS - FORT WORTH
Collin County, TX
Dallas County, TX
Denton County, TX
Ellis County, TX
Johnson County, TX
Kaufman County, TX
Parker County, TX
Rockwall County, TX
Tarrant County, TX

11. MIAMI
Dade County, FL
Broward County, FL

12. CLEVELAND
Cuyahoga County, OH
Geauga County, OH
Lake County, OH
Medina County, OH

13. ST. LOUIS
Franklin County, MO
Jefferson County, MO
St. Charles County, MO
St. Louis County, MO

St. Louis City, MO
Clinton County, IL
Jersey County, IL
Madison County, IL
Monroe County, IL
St. Clair County, IL
14. ATLANTA
Barrow County, GA
Butts County, GA
Cherokee County, GA
Clayton County, GA
Cobb County, GA
Coweta County, GA
De Kalb County, GA
Douglas County, GA
Fayette County, GA
Forsyth County, GA
Fulton County, GA
Gwinnett County, GA
Henry County, GA
Newton County, GA
Paulding County, GA
Rockdale County, GA
Spalding County, GA
Walton County, GA
15. PITTSBURGH
Allegheny County, PA
Fayette County, PA
Washington County, PA
Westmoreland County, PA
16. BALTIMORE - See Washington
17. MINNEAPOLIS - ST. PAUL
Anoka County, MN
Carver County, MN
Chisago County, MN
Dakota County, MN
Hennepin County, MN
Isanti County, MN
Ramsey County, MN
Scott County, MN
Washington County, MN
Wright County, MN
St. Croix County, WI
18. SEATTLE
King County, WA
Pierce County, WA
Snohomish County, WA
19. SAN DIEGO
San Diego County, CA [The San Diego DFA includes only that portion of San Diego County that is South of 33 degrees, 30 minutes north latitude.]
20. TAMPA - ST. PETERSBURG
Hernando County, FL
Hillsborough County, FL
Pasco County, FL
Pinellas County, FL
21. DENVER
Adams County, CO
Arapahoe County, CO
Boulder County, CO
Denver County, CO
Douglas County, CO
Jefferson County, CO
22. PHOENIX
Maricopa County, AZ
23. CINCINNATI combined with 42. DAYTON
Butler County, OH
Clermont County, OH
Hamilton County, OH
Montgomery County, OH
Warren County, OH
Boone County, KY
Campbell County, KY
Kenton County, KY
Dearborn County, IN
24. MILWAUKEE
Milwaukee County, WI
Ozaukee County, WI
Racine County, WI
Washington County, WI
Waukesha County, WI
25. KANSAS CITY
Johnson County, KS
Leavenworth County, KS
Miami County, KS
Wyandotte County, KS
Cass County, MO
Clay County, MO
Jackson County, MO
Lafayette County, MO
Platte County, MO
Ray County, MO
26. PORTLAND
Clackamas County, OR
Marion County
Multnomah County, OR
Washington County, OR
Yamhill County, OR
27. NEW ORLEANS
Jefferson Parish, LA
Orleans Parish, LA
St. Bernard Parish, LA
St. Charles Parish, LA
St. John The Baptist Parish, LA
St. Tammany Parish, LA
28. COLUMBUS
Franklin County, OH
29. NORFOLK
Chesapeake City, VA
Hampton City, VA
Newport News City, VA
Norfolk City, VA
Portsmouth City, VA
Virginia Beach City, VA
30. SACRAMENTO - See San Francisco
31. BUFFALO
Erie County, NY
Niagara County, NY
32. INDIANAPOLIS
Marion County, IN
33. SAN ANTONIO
Bexar County, TX
Comal County, TX
Guadalupe County, TX
34. PROVIDENCE - See Boston
35. CHARLOTTE
Gaston County, NC
Mecklenburg County, NC
Union County, NC
York County, NC
36. HARTFORD
Hartford County, CT

37. SALT LAKE CITY
Davis County, UT
Salt Lake County, UT
Weber County, UT
38. ROCHESTER
Livingston County, NY
Monroe County, NY
Ontario County, NY
Wayne County, NY
39. LOUISVILLE
Bullitt County, KY
Jefferson County, KY
Oldham County, KY
Shelby County, KY
Clark County, IN
Floyd County, IN
Harrison County, IN
40. OKLAHOMA CITY
Canadian County, OK
Cleveland County, OK
Logan County, OK
Mc Clain County, OK
Oklahoma County, OK
Pottawatomie County, OK
41. MEMPHIS
Shelby County, TN
Tipton County, TN
Crittenden County, AR
De Soto County, MS
42. DAYTON - See Cincinnati
43. BIRMINGHAM
Blount County, AL
Jefferson County, AL
Shelby County, AL
Walker County, AL
44. NASHVILLE
Cheatham County, TN
Davidson County, TN
Dickson County, TN
Robertson County, TN
Rutherford County, TN
Sumner County, TN
Williamson County, TN
Wilson County, TN
45. GREENSBORO
Forsyth County, NC
Guilford County, NC
46. ALBANY
Albany County, NY
Greene County, NY
Montgomery County, NY
Rensselaer County, NY
Saratoga County, NY
Schenectady County, NY
47. ORLANDO
Orange County, FL
Osceola County, FL
Seminole County, FL
48. HONOLULU
Honolulu County
49. RICHMOND
Chesterfield County, VA
Colonial Heights City, VA
Goochland County, VA
Hanover County, VA
Henrico County, VA
Petersburg City, VA
Powhatan County, VA
Richmond City, VA
50. JACKSONVILLE
Clay County, FL
Duval County, FL
Nassau County, FL
Nassau County, FL
St. Johns County, FL

[The Jacksonville DFA includes only those portions of St. Johns and Clay Counties that are North of 29 degrees, 55 minutes north latitude.]

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